

**Accessorial Liability as Part of the Doctrine of
Criminal Complicity in English and United Arab
Emirates Criminal Law**

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To my Grandmother

Abstract

Accessory liability is part of the doctrine of criminal complicity which provides a set of general legal rules that govern partnership in crime. This well-established type of criminal liability, which is considered to be one of the more important features of criminal law, focuses on the liability of secondary parties who either encourage, help or conspire with a principal who brings about the conduct element of a crime. Accessory liability, which in this regard, is derivative in nature, requires the principal to commit or at least attempt to commit the crime. It is also subsidiary or ancillary in nature, and thus is often assumed to be less serious than the liability of the principal. One might think that the concept of accessory liability is stable; in fact it is not. The discussion of the general concept of accessory liability is useful not only in resolving problems that arise in individual cases but also in terms of clarifying how legislation, concerning crimes such as money-laundering or drug trafficking, might deal with the problem of multiple offenders.

In this thesis I shall examine accessory liability from the general viewpoint without connecting it to a particular crime in both English and United Arab Emirates criminal law. The thesis is divided into five chapters. The first examines the required conduct element of accessory liability. The second discusses the ambit of causation and omission in accessory liability. The third chapter examines the general requirements of criminal mens rea; the mens rea requirements for accessory liability and other related and important issues to elaborate the circumstances that make a person a

secondary party. These include: the debate as to intention against knowledge or recklessness, the issue of knowledge of the principal offender's future crime, and the problem of interpreting the Federal Penal Code of the United Arab Emirates (F.P.C.) Finally, a view is developed as to what approach the law should follow in this area. Chapter four discusses accessorial liability for an additional crime committed by the principal (the doctrine of common purpose), while chapter five examines certain important issues related to accessorial liability such as the liability of the principal offender, the derivative theory, the English Law Commission Paper No. 131 on the new offence of assisting and encouraging crimes, and the doctrine of innocent agency. Final comments are concerned with examining selected defences available to accessories.

Declaration

I hereby declare that this thesis has been written by myself and that the work which enabled it to be produced was also by myself.

Khalid Khalfan Ahmad Almansoori.

Acknowledgements

I dedicate this work to the woman I owe everything, my dear grandmother, as a simple confirmation of her love and respect, for all the things she has done for me.

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Abbreviations

AC	Law Reports, Appeal Cases (House of Lords & Privy Council)
All ER	All England Law Reports
Car & P	Carrington and Payne's Report (1823-41)
Cr. App. Rep.	Criminal Appeal Reports
<i>Crim. LR</i>	Criminal Law Review
ER	English Reports (1220-1865)
F.P.C.	Federal Penal Code No. 3 of 1987 (UAE)
F.S.C.	Federal Supreme Court of the UAE
H.C.I.L.	Higher Committee for Islamic Legislation
K.B.	Law Reports, King's Bench Division
LC. No. 43	Law Commission Working Paper No. 43, <i>Parties, Complicity and Liability for the Act of Another</i> (1972).
LC. No. 131	Law Commission Consultation Paper No. 131, <i>Assisting and Encouraging Crime</i> , (1993).
<i>L.Q.R.</i>	Law Quarterly Review
M.P.C.	Model Penal Code, American Law Institute, (1962)
<i>MTLCC</i>	Smith, K.J., <i>A Modern Treatise on the Law of Criminal Complicity</i> (1991), Oxford: Oxford University Press.
<i>PCL</i>	Ashworth, A., <i>Principles of Criminal Law</i> (2 nd ed. 1995, (3 rd ed. 1999), Oxford: Oxford University Press
Q.B.	Law Reports, Queen's Bench Division
RTR	Road Traffic Reports
<i>TBCL</i>	Williams, G., <i>Textbook of Criminal Law</i> (2 nd ed. 1983), London: Stevens and Sons.
UAE	United Arab Emirates

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Introduction

Introduction

This thesis is an examination of accessorial liability, as an aspect of the general doctrine of criminal complicity, in English and UAE criminal law.¹ The study focuses on this long-established form of criminal liability, often referred to as criminal complicity, which has been described as one of the worst features of English criminal law because of the enormous uncertainty that surrounds nearly almost every aspect of it, something that has not yet been reflected in Arabic jurisprudence. This thesis examines the facts and the problems, and questions how reform might prevent the doctrine being considered as imposing too wide a net of liability. Before proceeding with this examination, two topics are covered: first, the origin of the UAE Federal Penal Code (No. 3 of 1987) which is the substantial criminal code in the UAE; second, the definition of accessorial liability. English law has been chosen for the comparison, rather than Scots law, for the following reasons: the UAE Federal Penal Code, in this area, is closely linked with English law; and there is also a rather larger body of case law and doctrinal writing in this area in relation to English law than there is in relation to Scots law.

The UAE Federal Penal Code (No.3 of 1987)

The F.P.C. was issued on December 8th 1987 and came into force on March 8th, 1988. Many assume that it is based on other Arabic penal codes that have been

derived from the Egyptian Penal Code of 1937 and its subsequent drafts, which were derived in turn from the French Penal Code. In fact, the Egyptian Penal Code is not the sole historical source of the F.P.C. The latter includes numerous articles not to be found in the Egyptian Penal Code and indeed in other Arabic codes. Moreover, the F.P.C. was formulated and drafted with attention to Islamic *Sharia* texts.

In spite of the fact that the F.P.C. came into force in 1988, its basic structure was laid ten or fifteen years earlier. The Ministry of Justice was working upon a penal code under the name of the '*Jzaa*' Code (penal or retribution code) whose source, apparently, was unknown, as was the identity of the committee members who drafted it; nor are we able to trace its draft memorandum which explains the draft code; but even if there were such a memorandum it is likely to have been unofficial. It is important to note that at that time the UAE Cabinet passed a federal decree (decree No.5/1978).² The aim of this decree was to establish a Higher Committee for Islamic Legislation (H.C.I.L.) to bring UAE codes closer to Islamic jurisprudence. Surprisingly, the decree was not published in the Union's Official Gazette. As a matter of fact it was only a year later, in 1979, that the Minister of Justice issued the relevant executive order establishing the *modus operandi* of the Committee.³

¹ English law in this regard refers to England and Wales. By contrast Scottish law is a separate legal system, and beyond the discussion of this thesis.

² Al- Muhairi, B.S., *Conflict and Continuity: Islamization and Modernization within the U.A.E. Penal Law*, unpublished Ph.D. thesis, The University of Kent at Canterbury, January 1994. pp. 179-180. It is possible to say that Butti Al-Muhairi was the first researcher to report the work of the H.C.I.L. In fact many legal academics in the UAE are neither aware of the work of the above committee, nor fully trained in Islamic *Sharia* in criminal matters.

³ The executive order issued by the Ministry of Justice included orders Nos. 27, 30, 31 and 32 which had been published in the UAE Official Journal No. 69 (02/01/ 1979) pp. 27-36. See Al-Muhairi, B.S., *op. cit.*, p. 179 and note 13.

The main duty of the H.C.I.L. was to eradicate the contradictions between the *Sharia* and the secular conception of the federal codes that either had been issued or drafted by the government and only in the light of what had been reported to the H.C.I.L. The review board was composed of a superior committee in addition to two sub-committees: (i) a committee for penal legislation and its corresponding procedures; (ii) a committee for civil, commercial and maritime laws. The H.C.I.L. immediately embarked on the examination and preparation of 16 draft federal codes, which included, for example, the draft penal code and the draft personal affairs code. Most of these codes failed to be enacted as planned for reasons that I will later consider. It is important to note in this connection that the Federal Civil Transactions Code (Code No. 5 of 1985) was the only code with an Islamic overtone that the H.C.I.L. was able to legislate.

It has been mentioned that the H.I.C.L. worked on a secular draft '*Jzaa*' Code provided by the Ministry of Justice instead of drafting an entirely new penal code. However, instead of removing the contradicted articles which are against *Sharia*, the H.I.C.L. moved to codify the Islamic *Sharia* crimes of *Hudoud*, (prescribed penalties for some serious crimes as laid down in the Quran and Sunna), *Qisas* (Retaliation) and *Diyyah* (compensation or blood money). It also changed the shape and the structure of other articles to accommodate the terminology of Islamic *Sharia*, establishing, in addition, that it should be the main source of understanding the draft Federal Penal Code. As a result the H.I.C.L. had prepared a draft penal code

consisting of 583 articles, divided into two parts: the first part is general and included 197 articles, while the second is a special part and included 386 articles.⁴

This draft code, however, did not succeed in becoming a full code. Butti Al-Muhairi argues that the reason for the failure lies in the fact that the formulation of the federal decree No.5 / 1978, concerning the work of the H.C.I.L., was intended to eradicate any contradictions between the *Sharia* principles and the federal codes. In other words the federal decree did not aim at a full reformulation of the code, nor at the codification of Islamic *Sharia*. Such codification, as Al-Muhairri argues, was a violation of both the federal decree and the executive orders of the Ministry of Justice, which were intended only to remove objectionable clauses, and were restricted to those codes presented to the H.C.I.L., not covering other codes related to commerce and banking.⁵ On that basis, the amendment of the F.P.C. included the deletion of major proposals, which included *Sharia* crimes, and the reduction of the number of articles from 583 to 434, dividing them into two parts.⁶ The general part

⁴ Ministry of Justice & Islamic Affairs, *Allgnah Aloulia le Altashriat: Almudakera Aledahia le Mashru'a Qanon Alokobat*, (Arabic. *The Higher Committee of Legislation: Draft Memorandum of the Draft Federal Penal Code*) (nd.), Unofficial Draft Memorandum.

⁵ Al- Muhairi, B.S., *op. cit.*, pp. 172-4.

⁶ The F.P.C. classification of crimes is similar to other civil law systems in that it classifies crimes into three categories: felonies, misdemeanours, and contraventions: Article (26) indicates that: "Crimes are divided into the following: (1) *Hudoud*, (2) *Qisas* and *Diyah* crimes, (3) *Tazia'ar* crimes are of three types: felonies, misdemeanours, and contraventions. This classification is determined in accordance with the punishment mentioned by the Code..." Article (28) defines felonies as: "A felony is a crime punishable by any of the following: (1) any punishment of *Hudoud* crimes, and *Qisas* crimes except of *Shurb al-Khamr* (drinking alcohol) and *al-Qadhif* (accusation of illicit sexual intercourse), (2) death penalty, (3) life imprisonment, (4) temporary imprisonment (imprisonment of not less than three years and not exceeding fifteen years)." By contrast, article (29) states that: "A misdemeanour is a crime punishable by one or more of the following: (1) detention (of not less than one month and not exceeding three years), (2) a fine exceeding 1000 Dirhams, (3) *Diyah*, (4) lashes (whipping) for *Shurb al-Khamr* (drinking alcohol) and *al-Qadhif* (false accusation of illicit sexual intercourse)." Contraventions is mentioned by article (30) when it states that: "A contravention is any act or omission punishable by the codes or regulations by one or both of the following: (1) custody for a period not less than 24 hours and not exceeding 10 days in any of the places designated for that purpose, (2) a fine not exceeding 1000 Dirhams." A child under seven years of age is incapable of

consists of 148 articles; the special part is composed of 284 articles. *Sharia* crimes, were summed all under one article of the F.P.C., Article (1), which states that:

“Islamic *Sharia* shall apply to the crimes of *Hudoud*, *Qisas*, and *Diyah*. *Tazia’ar* crimes and its punishments shall be determined in accordance with the provisions of this code and other penal codes”.

This means that *Sharia* crimes and their elements are governed by Islamic *Sharia* and not by the general provision of the F.P.C., a position similar in a sense to English law, where some crimes are governed by the common law while some are governed by statute. It must be noted that any further discussion of *Sharia*, in this respect, is beyond this thesis, our main concern being the F.P.C. in relation to accessorial liability.⁷ However, for the ease of understanding of *Sharia*, the following outline is provided: *Sharia* in Arabic is ‘the road to the watering hole’ or ‘the straight path to be followed’. In general, *Sharia*, refers to (a) acts of faith and relation with God (b) a moral code of self-discipline and improvement of character (c) human actions (that have a legal impact) and their relationship with God and other fellow human beings. In relation to criminal law, *Sharia* is connected to *Hudoud*, *Qisas*, *Diyah*, and *Tazia’ar*. The term *Tazia’ar* (Discretionary) is an Islamic term referring to all other

committing a crime, while defendants between seven to eighteen years of age are governed by Federal Juvenile Code No. 9 for 1976. See articles: (62 and 63).

⁷ To find more about Islamic *Sharia*, see for example: Hussain, J., *Islamic Law and Society: An Introduction* (1999), Sydney (Australia): The Federation Press. pp. 134-145; Mahmood, J.M., *Aldoula Alislamia Almuasera: Alfekra wa Altatbek*, (Arabic. *The Contemporary Islamic State: The Idea & Practice*) (1992), Egypt: Dar Alkitab Almassri. 245-6; Dutton, Y., *The Origins of Islamic Law: The Quran, the ‘Muwatta and Madinan Amal’* (1999), UK: Curzon Press; Ahmad, I.M.I., *The Testimony of Witnesses and Its Role in Islamic Criminal Jurisprudence*, unpublished Ph.D. Thesis, The University of Edinburgh 1992; Al-Mawardi, Abu’l-Hasan., *Al-Ahkam as-Sultaniyyah: The Laws of Islamic Governance*, trans. Yate., A., (1996), London: Ta-Ha Publishers Ltd; Darsh, S. M., “The Islamic *Sharia* and its Significance for the Islamic Society” (1996) *‘Inter Alia’ University of Durham Student Law Journal* vol.1 issue 5, p. 30; Lombardi, C. B., “Islamic law as Source of Constitutional Law in Egypt: The Constitutionalization of the *Sharia* in a Modern Arab State” (1998) *Columbia Journal of Transnational Law* Vol. 37 No. 1, p. 81; Wiechman, D, Kendall J, and Azarian, M., “Islamic Law: Myths and Realities” www.ummah.net/bicnews/articles/law.htm.

crimes created by the State (similar to the legislation role nowadays), which are not classified as *Hudoud*, or *Qisas* crimes. By contrast, ‘*hadd*’ (in a singular form of *Hudoud*) means a prescribed penalty for a serious crime as laid down in the Quran and Sunna. Thus, *hudoud* crimes are those specifically mentioned in the Quran and explained by the Sunna (tradition of the Prophet) as a violation of the limits that God has placed on human behaviour. These crimes and their punishments, if proved, must be enforced if they come before the court and no one, then, has the right to stop the application of the law. This is emphasised by the direct words of the Quran. For example, it is mentioned in the Quran that: “Such are God’s limits, so do not exceed them; who exceed God’s limits are wrongdoers.” (The Cow 2: 229), and also it is mentioned that: “Those who do not judge by what God has sent down are disbelievers...wrongdoers...perverse.” (The Table 5: 44,45,47). Muslim jurists agree that *Hudoud* crimes are five: *al-Sariqa* (larceny): stealing property from lockfast places is punishable by amputation of the hand of the principal. *al-Hirabah* (highway robbery): the punishment of robbery with violence varies according whether there is a death, injury or merely a robbery (death, crucifixion, cutting off the hand and the foot on opposite sides, and exile). *Shurb al-Khamr* (drinking alcohol): is punished by 40 lashes. *al-Zina* (illicit sexual intercourse): is punishable by 100 lashes for fornication, and by death penalty for adultery. *al-Qadhf* (accusation of illicit sexual intercourse): false accusation of illicit sexual intercourse is punishable by 80 lashes and the defendant testimony, in a future cases, will be considered worthless. Most jurists include the following two crimes as *Hudoud* crimes: *al-Ridah* (Apostasy: a Muslim’s rejection of Islam as religion), and *al-Baghy* (armed rebellion), which might lead to death punishment. *Hudoud* crimes are governed by very strict rules of

proof which means that if there is a single surrounding doubt, it must not be applied. The concept of *Qisas* (equality in retaliation, or retaliation) which might also be referred as 'an eye for an eye and tooth for tooth' is the second related concept of Islamic *Sharia* in criminal matters. This type of liability gives the victim the right, through the State, to inflict the same amount of harm he suffered from the action of the defendant or instead, he/she or his/her heirs, ask for *Diyah* (compensation). It must be emphasised that *Qisas* is not enforced when there is a doubt that *Qisas* on the defendant might cause more harm than the actual harm he had inflicted on the victim. Thus, the victim in almost all examples can ask only for *Diyah* (compensation).

The general shape of the F.P.C. somewhat resembles, with some clear exceptions, the Arabic penal codes that were formulated along the lines of the Egyptian Penal Code of 1937. The F.P.C. also shares similarities, but with apparent differences, to the codes of Lebanon, Syria and Jordan and Kuwait; all these codes are somehow closer to the French Penal Code. Nevertheless it is important to point out (due to the special circumstances under which the F.P.C. was passed and the way its clauses and articles were formulated) that it is difficult to establish its direct historical source. In reality the F.P.C. is a combination of *Sharia*, even if most of this had been deleted at the draft stage, and the above mentioned Arabic codes. In addition the F.P.C. was affected by the Indian Penal Code of 1860 through the Egyptian Penal Code of 1937, by which the federal code was in some ways affected. The main problem of the F.P.C. is one of interpretation because firstly, there is no recognisable official memorandum explaining the code, and secondly, it is difficult to identify a specific

Arabic criminal code as the historical source of the F.P.C. This is a matter that compels some people mistakenly to resort to Egyptian jurisprudence and wrongly to consider the Egyptian Penal Code of 1937 as a primary source for interpretation of the F.P.C. (I shall examine this issue in detail in chapter 3). It is my view that the interpretation of the F.P.C. is to be based on the endorsement of the rule of 'narrow interpretation' that will be applied through this study.

At this stage one should indicate that as a concomitant to the federal system of the UAE there are two judicial systems within the UAE. The federal judicial system and its federal Supreme Court (F.S.C), based in the capital Abu-Dhabi, has jurisdiction over civil and criminal federal matters in the UAE, except in relation to the emirate of Dubai, which has its own similar three-stage courts with its Cassation Court, which is the final stage of civil, and criminal matters in Dubai.⁸ Moreover, as sign of independence, Dubai has its own public prosecution system that is not administrated

⁸ It is true to say that the F.S.C. considers article (1), mentioned above, as a authority to apply Islamic law. See: UAE University., *Mgmuat Alhakam Algazaiah le Almhakamat Alittihadia Alulia* (Arabic. *Criminal Rulings of the Federal Supreme Court*), (1989-1997) UAE: UAE University. However, it is not known whether all the federal courts apply all Sharia crimes. By contrast, Dubai Cassation Court has a different understanding towards the interpretation of article (1) of the F.P.C. The Dubai Court holds that *Sharia* in criminal matters, as suggested by the F.P.C and the F.S.C., does not apply in Dubai by reference to the above article. Establishing that the aim of article (1) is, rather, an act of encouragement by the federal legislation to adopt *Sharia* as the main source of law and to codify it in a special criminal code apart from the F.P.C. See: Dubai Cassation Court. Ruling Nos. 43,53,56,57 for 1997, unpublished decision. In fact, the opinion of Dubai Cassation Court is neither just nor correct. The F.P.C. is, rather, plain in this respect, and the formulation of other articles, within the framework of the F.P.C., itself is an indication to the obligatory application of *Sharia* relating to *Hudoud*, *Qisas*, and *Diyah*. This ruling suggests that the Dubai Cassation Court shows clear unwillingness to apply *Sharia* despite the fact that this is contrary to the general principle which confirms that "*La ijtihaad ma'a wugoud al na'as*" (an additional interpretation is not allowed when the legal rule is clear and understandable). This controversy is also extended to law teaching in universities. Presumably, only in the UAE University in Alain city, *Sharia* is comprehensively taught besides the secular law. Other universities concentrates on secular law and provide minor teaching of *Sharia* in relation to civil matters of marriage, divorce, child care...etc, but not according to *Sharia* criminal law. The problem is that when the UAE law considers Islamic *Sharia* as essential part of the law, most of law graduates are not totally familiar with it, because comprehensive teaching of *Sharia* is not part of their education, nor their practice especially in Dubai.

by the federal public prosecution, which operates in all other Emirates members of the UAE.⁹

A significant number of judges who are currently serving in all judicial stages in the UAE in both the federal and local judiciary are foreigners originating from various Arab countries, mainly from Egypt. Although no reliable figure is available as to the total number of UAE and non-UAE judges, it is indisputable that the overwhelming majority of judges who are appointed by the federal judiciary are from Arab countries such as Egypt, Sudan, Morocco, Tunisia, Syria, Mauritania and Jordan. Likewise the judiciary of the state of Dubai appoints judges from Sudan, Jordan, Palestine and, in greatest number, from Egypt. On the other hand, the state of Rasl-alkhima gives priority to the appointment of Saudi judges even though they are not familiar with the culture and the law of the UAE. Many legal academics would be astonished by this unusual diversity in the UAE legal system on account of the fact that the judiciary is a prerequisite constituent of any independent state, and judges should normally be members of the community of that state. In order to overcome this problem, both the federal and the state government should concentrate to a greater extent on training and developing the skills of local judges and encouraging qualified and competent citizens to join the judiciary. In addition, UAE legal commentators should focus on discussing and writing materials relevant to the UAE law.

⁹ Al Mansoori, A.E.M., *The Law of Arrest and Similar Procedures: A Comparative Study*, unpublished Ph.D. thesis, The University of Edinburgh 1997. pp. 13-42; Al-Owais, H., *The Role of the*

It is worth noting that before the federation of the United Arab Emirates (UAE), each of the seven members of the union enjoyed sovereignty in accordance with the rules of international law, which allowed them to exercise their own territorial jurisdiction in relation to domestic law. Foreign representation was retained in the hands of the British government, according to the Exclusive Agreement of 1892 between what was called the Trucial States and the British government.¹⁰

Internal jurisdiction on penal matters in the Trucial States was exercised in the enactment of their own domestic and regional codes. Thus there was the Abu-Dhabi Penal Code of 1970, the Dubai Penal Code of 1970, the Sharjah Criminal Code of 1970, based on the first two codes, and the Penal Codes of Aum-alquain and Ras-alkhima of 1971. The framework of these domestic codes was mostly based on the Anglo-Saxon model derived from Indian Criminal Codes.¹¹ Currently, the Federal Penal Code No 3 of 1987 (the F.P.C.) is applied in all of the members of the UAE. Some Emirates still apply certain parts of their earlier codes, a situation which is legally permitted as the constitution of the UAE allows members to have legal jurisdiction on regional matters.¹² For example, the Emirate of Dubai exercises this option by having two criminal codes on penal law matters, namely the F.P.C. and some retained parts of its old Penal Code of 1970. This contrasts with the situation in

Supreme Court in the Constitutional System of the UAE: A Comparative Study, unpublished Ph.D. thesis, University of Durham 1989.

¹⁰ Al Mansoori, A.E.M., *op. cit.*, p. 8; Al-Bharna, H., *The Arab Gulf States: Their Political, Legal Status and Their International Problems* (1975), Beirut: Librairie du Liban. p. 5; Al- Alkim, H., *The Foreign Policy of the U.A.E.*, (1989), London: Saqi Books. p. 4.

¹¹ Mahdi, A., *Sharh Alquaed Alama le Qanon Alokobat: Dirash Muqarana bean Qanon Alemarat Alarbia Almutheda (Abu Dhabi, Dubai, wa Mashrua Alqanon Alithadi) wa Alqanon Almassri* (Arabic. *Explanation of the General Rules of the Penal Law: A Comparative Study between UAE Laws (Abu Dhabi, Dubai, and the Draft Federal Penal Code) and the Egyptian Law*) (1983), Cairo: Atlas Publication. p. 53.

other Emirates which have transferred final appeal functions to the Federal Supreme Court (F.S.C), based in the capital Abu-Dhabi.

There has been a certain degree of confusion over the extent of jurisdiction of the Federal Court in each Emirate. One view is that the Federal Code abolished all other pre-1987 domestic codes. However, a recent ruling by the F.S.C in 1988, held that domestic codes are still applicable only if they do not dissent from provisions of the F. P. C. This ruling was based on the rereading of the provision of the F.P.C. itself.¹³

The articles referred to are:

1- The Presidential Order to issue the F.P.C. in article (1) stating that:

“ The law attached here on crimes and penalties shall be enforced, and any provision contrary to its provision shall be repealed”

2- Article (1) of the F.P.C states that:

“ ...Crimes and chastisement punishments shall be determined in accordance with the provision of this law and other penal codes.”

The above articles lead us to the conclusion that the F.P.C ultimately has a position of supremacy in relation to criminal liability, which does not allow domestic laws to be applied contrary to its provisions. Moreover, this means that the provisions of the domestic codes that govern partnership in crime are abolished and that the F.P.C. is the governing code for criminal complicity.

¹² Articles: 99; 104; 116; 120; 121 and 122 of the 1971 UAE Constitution.

¹³ F.S.C Ruling No. 88 for 1988 UAE University., *Mgmuat Alhakam Algazaiah le Almhakamat Alittihadia Alulia* (Arabic. *Criminal Rulings of the Federal Supreme Court*), UAE: UAE University. Issue No. 13 for 1997, pp. 217-219; Cf. Dubai Cassation Court Ruling No. 6 for 1990, (10 /11/ 1990). Dubai Cassation Court., *Majalt Alqda wa Altashria* (Arabic. *Court & Legislation Journal*), Dubai. January 1992 p. 661.

Accessory liability

Accessory liability is the general body of rules, located in the general part of a criminal law, that captures the criminal responsibility of a person (the accessory) who acts or omits to act (provided that there is a legal duty to act), by a prior or concurrent secondary performance associates himself in the offence committed by another person (the principal offender) who brings about the physical act of the offence and whose liability is normally explicitly provided for in the definition of the offence in question.¹⁴

Secondary criminal partnership, in both English and UAE criminal law, is not an offence in itself, but, rather, a mode of association in the offence of another person, who commits the required actus reus. This suggests that accessory liability is conditional upon the commission of an offence by the principal offender. The derivative nature of this liability underlines the fact that the violation of the criminal law is carried out by the principal offender, who produces the criminal consequences,

¹⁴ Peter Gillies defines this type of liability as: "the law that governs partnership in crime...or the principles of criminal law that governs the joint implication of each of two or more persons in the commission of a given crime." Gillies, P., *The Law of Criminal Complicity* (1980), Australia: The Law Book Company Ltd. p. 1; By contrast, Keith Smith indicates that complicity is: "the general body of concepts and rules that determines the circumstances when one party (the accessory) by virtue of prior or simultaneous activity or association will be held criminally responsible for another's (the perpetrator) wrongful behaviour." Smith, K.J., *A Modern Treatise on the Law of Criminal Complicity* (1991), Oxford: Oxford University Press. pp. 1-2; Glanville Williams indicates that: "Complicity in crime extends beyond the perpetrator to accessories. Both the perpetrator and the accessory are regarded by the law as participants in the crime, and are called accomplices. The perpetrator is an accomplice of the accessories, and they are accomplices of the perpetrator and of each other." Williams, G., *Textbook of Criminal Law* (2nd ed. 1983), London: Stevens and Sons. p. 329. According to the ordinary meaning of the term, an accessory is a person who is a party to a crime that is actually committed by someone else (the perpetrator). An accessory is one who either successfully incites someone to commit a crime (counsels or procures) or helps him to do so (aids and abets). An accomplice is a party to a crime, either as a perpetrator or as an accessory. Furthermore, the term principal is applied to a person who actually carries out a crime himself or through an innocent agent, or under vicarious liability. Oxford University., 'Oxford Reference-shelf CD-ROM: Law Dictionary' Oxford: Oxford University Press.

and not by the accessory, who is only involved by subsidiary association. However, in some situations such participation might be viewed as dangerous or more dangerous than the liability of the principal, but this is not the case in every crime.

Accessorial liability occupies intermediate ground between inchoate and principal liability (although that the F.P.C. does not adopt a general form of liability for incitement and conspiracy, except where it stated otherwise). It is generally assumed that the action of the principal offender is the main violation of the criminal law while accessorial behaviour is considered to be less harmful. Because of this, accessorial liability follows upon the commission of the principal offence. If the principal does not commit the offence, with which he is associated, there is no complicity but, rather, an inchoate liability where the criminal law imposes such liability.

The term 'accessory' will be used throughout this study to refer to a secondary party who aids, abets, counsels or procures the commission of the principal offences, as in English law, and for a party who instigates, conspires or assists the principal in committing the offence, as in the F.P.C. of the UAE. Consequently, accessorial liability is the term used to refer to this type of culpability. By contrast, the term 'accomplice' will be used to refer to a participant in a crime, who may be either a principal or an accessory. A principal, or a perpetrator, then, is the one who commits the actus reus of the offence himself or through an innocent agent, (or vicarious liability as in English law) and his liability is located in the definition of the offence that he brings about or attempt to. It is important to note that this type of criminal

liability under English law does not have a recognised name. Various terms may be used to describe it, including complicity, secondary partnership, liability of accessories, and aiding and abetting.¹⁵ But even if a single term is used, the other terms tend to be employed as synonymous for this subsidiary and ancillary type of liability.¹⁶ Because of the theoretical and legal distinction between the principal offender and the accessory, the term complicity should be adopted to refer to the discussion of the joint liability of the principal offender, the co-principal and the accessory. By contrast, accessorial liability should be used, in English law, to describe the liability of a person who aids, abets, counsels or procures the principal in committing the offence, and in the case of the F.P.C for those who instigate, conspire or assist the commission of the principal offence.

¹⁵ For example English Draft Criminal Code 1989 uses the terms: secondary parties, instead of complicity, accessories for ancillary activities and principal for the main offender. Law Commission Report No. 177, *Criminal Law: A Criminal Code For England and Wales* (1989); a similar terms used by LC. No. 43 but adding the term accomplice. Law Commission Working Paper No. 43, *Parties, Complicity and Liability for the Act of Another* (1972); Smith, J.C., *Smith and Hogan Criminal Law*, (18th ed. 1996), London: Butterworths, who also uses the term accomplices and divides them to principals and secondary parties and sometimes accessories (perhaps the opinions of the above three sources are a reflection of the situation of English case law in this regard); a similar terms is used by Ashworth, A., *Principles of Criminal Law* (3rd ed. 1999), Oxford: Oxford University Press. In Clarkson C. Keating, H., *Criminal Law: Texts and Materials* (4th ed. 1998), London: Sweet & Maxwell, the term secondary parties is used to refer to principals and accessories, and accessorial liability for the second. By contrast, George Fletcher describes this liability under the headline of perpetration versus complicity. Fletcher, G., *Basic Concepts of Criminal Law* (1998), Oxford: Oxford University Press; the term accomplice was used by Glanville Williams, who divides them into perpetrator and accessory. Williams, G., *Textbook of Criminal Law* (2nd ed. 1983), London: Stevens and Sons. Historical background of criminal liability of accomplices in English law is beyond the reach of this study. A rare source of this is in Smith, K., *MTLCC*, *op. cit.*, p. 2 at note 4. Presumably the Arabic jurisprudence translation of these terms use criminal complicity or accomplices for all parties, principal for the perpetrator and the accessorial or secondary liability for the liability of an accessory.

¹⁶ Peter Gilles for example, used the term complicity as a title for his book and the term accessory within it to describe the liability of secondary parties. Gillies, P., *Criminal Complicity*, *op. cit.* Similar situation adopted in Smith, K.J., *MTLCC*, *op. cit.* The team of LC. No. 131 used the terms: complicity, accessoryship, and secondary liability as a general description and reference. Law Commission Consultation Paper No. 131, *Assisting and Encouraging Crime*, (1993). p. 3.

The thesis has five chapters. Chapter one starts with the situation of the accessorial liability under English law, and proceeds to a consideration of the UAE Criminal law and Arabic jurisprudence. It examines the conduct element of this liability (the *actus reus*) that makes a person an accessory to an offence. Chapter 2 examines two related and important issues to accessorial liability, namely, causation and omission in order to ascertain whether they accord or contradict with the liability of the principal offender. Chapter 3 examines the *mens rea* requirements for accessorial liability. In this chapter I shall discuss the general requirements of criminal *mens rea*. Following this, there is a discussion of how a person can become guilty of a criminal offence as an accessory, and other related and important issues in order to elaborate the circumstances that make a person a secondary party to an offence. This includes the debate as to intention as against knowledge or recklessness, and the issue of knowledge of the principal offender's future crime. Finally, a view is expressed as to what approach English law should follow in this area. Finally in this chapter there is an evaluation of the doctrine of general requirements of *mens rea* and of accessorial liability under UAE criminal law with a view to seeing how the issue is settled in that legal tradition and also to pointing out the status of the concept under the F.P.C. Accordingly, certain important questions shall be asked, including: Is the F.P.C. in this area intelligible to the layman? Should the F.P.C. be interpreted in the light of other sources, such as legal commentary? What approach should the F.P.C. take to *mens rea* in respect of accessorial liability?

Chapter 4 deals with accessorial liability for an additional crime committed by the principal (the doctrine of common purpose). This doctrine of common purpose has

generally been employed in the theory of criminal complicity to resolve the liability of an accessory for an additional or collateral offence committed by the principal. In this chapter I shall examine which factors decide accessorial liability for the additional crimes and how English law in the past has treated this subject. One reason for carefully examining this doctrine is that the culpability of the accessory, unlike the principal, is realised only on the basis of his mens rea because in the majority of cases the accessory's attitude may be described as "negative". In other words, the accessory does not commit the collateral offence, nor does he possess the mens rea required of the principal. These are, therefore, a number of problematic issues which arise from this doctrine.

Chapter 5 discusses miscellaneous aspects of accessorial liability. These include: the liability of the principal offender in the light of the definition of this category; the legal distinctions between those who are principals and those who are merely accessories; the derivative theory and some of its problems that led the English Law Commission to introduce a new proposal to change the shape of accessorial liability to a new concept based on inchoate liability; and the doctrine of innocent agency, which is a legal fiction that has emerged to deal with the negative consequences of derivative liability, which considers and treats an accessory as a principal offender. Finally there is a discussion of selected defences available to accessories such as the general defences and the defence of withdrawal.

Chapter 1

The actus reus requirements for accessory liability

Chapter 1

The actus reus requirements for accessorial liability

Criminal liability is discussed under two headings: the actus reus which refers to the conduct element, and mens rea which addresses the mental element. The aim of this chapter is to examine and analyse the prohibited conduct from the point of view of the liability of the secondary offender, starting with English law, and then proceeding to an examination of the situation under the United Arab Emirates law, and in particular, under the F.P.C.

It is very important at this early stage to state that both systems, English and UAE law, agree on the following general requirements of accessorial liability: accessories must perform the incriminating act, and have the required mens rea, and that accessorial liability is conditional upon the committing of an offence by the principal offender. Thus this derivative nature of accessorial liability underlines the fact that the violation of the criminal law is carried out by the principal offender who produces the criminal consequences, and not the accessory who is only involved by association. An examination of this fundamental principle will be undertaken in another chapter.

English Law

Modes of Accessorial Liability

The situation prior to the Criminal Law Act 1967:

The subject of secondary participation in criminal liability is an issue, which has long concerned commentators on the common law. The Criminal Law Act 1967 was a turning point in the history of this ancient doctrine. The situation before this legislation was as follows:

In the case of a felony there were four modes of participation:

- a) *Principals in the first degree*: The actual perpetrator of the offence if acting alone or the joint principals if there was more than one; both cause the commission of the offence.
- b) *The principals in the second degree*: Those secondary offenders or aiders and abettors who are present at the commission of the offence.
- c) *Accessories before the fact*: Those who counsel or procure the offence but are not present at its commission.
- d) *Accessories after the fact*: An accessory after the fact was one who 'knowing a felony to have been committed by another: receives, relieves, comforts or assists the felon.'¹ It is clearly understood from this definition that to be an accessory after the

¹ Smith, K.J., *A Modern Treatise on the Law of Criminal Complicity* (1991), Oxford: Oxford University Press. p. 7.

fact was a form of complicity related only to felonies; as such it was not applicable to misdemeanours. The reason was that the assistance given after the fact to felons was regarded as seriously as committing the principal offence.

2) In the case of misdemeanour: All accomplices were regarded principals.

The situation after the Criminal Law Act 1967:

The Criminal Law Act 1967 abolished the distinction between felony and misdemeanour, and as result the *accessory after the fact* has disappeared, except in the case of treason, in which pre-1967 categories remain.² The 1967 Act created a new offence of assisting offenders, which applies to assisting offenders who commit an arrestable offence. One of the important changes brought by the 1967 Act was the abandonment of the distinction between felony and misdemeanour in relation to accessorial liability.

The subject of secondary participation is governed for the most part by common law but there is an important legislative contribution to the doctrine in the shape of s. 8 of Accessories and Abettors Act 1861 (as amended by the Criminal Law Act 1977) which states:

“Whoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.”

The Magistrates Courts Act 1980 in s. 44 (1) extends the ambit of accessorial liability to cover summary offences. Clearly from the reading of section 8 of the

² Curzon, L.B., *Criminal Law* (8th ed. 1997) M&E Pitman Publishing. p. 61.

1861 Act, English law seems to use four terms to describe the conduct element of complicity: to aid, abet, counsel and procure. The 1861 Act does not give further explanation of the exact meaning of those four terms. However one of the drafters of that Act indicated that this was intended to follow the common law approach to the subject.³ But what do these terms mean? It is well known that both aiding and abetting address the state of accessories who are present at the committing of the offence while the absent accessories are those who counsel and procure the offence. Should this be the only distinction?

It seems that the distinction is not rigidly followed now. Cases on accessorial liability take differing views. *Du Cross v. Lombourne* (1907) and *Attorney General v. Able* (1984) are cases where the courts did not follow this ground of distinction.⁴ The court in *Able*, described the provision of a book on suicide as abetting, while in terms of the above distinction it should be called counselling as it was before the fact. Further, a leading authority on criminal law, John Smith (1996) expresses the view that the present distinction has no effect of the liability of accessories.⁵ Another ground of distinction has been proposed, based on the notion that ‘aid’ refers to the actus reus and ‘abet’ refers to mens rea, but this distinction is unhelpful and it does

³ C. G. Greaves, mentioned in Smith, J. C., “Aid, Abet Counsel, or Procure” in Glazebrook, P. R., (ed.) *Reshaping the Criminal Law* (1978), London: Sweet & Maxwell. p. 120 at p. 125. Also it seems that this is supported by the case law as it was in *Benford v. Sims* [18981] 2 Q. B. 641; *Du Cross v. Lombourne* [1907] 1 K. B. 40; *Carter Paterson and Pickford Ltd v. Wessel* [1947] K.B. 849. See: Smith, J. C., *ibid.* p. 125 at note 20.

⁴ *Du Cross v. Lombourne* [1907] 1 K.B. 40; *Attorney General v. Able* [1984] 1 Q.B. 795.

⁵ Smith, J.C., *Smith and Hogan Criminal Law*, (18th ed. 1996), London: Butterworths. pp. 129-132; Gillies, P., *Criminal Law* (3rd ed. 1993), Australia: The Law Book Company Ltd. p.150, where he says that the presence rule is sophisticated and archaic which means very little. This clearly suggests that the four words that describes accessorial actus reus should be reduced to three: encouragement, assistance and procurement.

not establish the difference between counselling and procuring.⁶ The essential difficulty in fact, is that the language used in this doctrine is ancient and complex.⁷

One might assume that the four words: aid, abet, counsel and procure, used by the 1861 Act, had no particular meaning and that they could be employed interchangeably. This view was abandoned after *Attorney General Reference No. 1 for 1975*.⁸ According to Lord Widgery:

“We approach section 8 of the 1861 Act on the basis that the words should be given their ordinary meaning, if possible. We approach the section on the basis that if four words are employed here ‘aid, abet, counsel or procure’, the probability is that there is a difference between each of four words... Because if there were no difference, Parliament would be wasting time in using four words where two or three would do... Each word must be given its ordinary meaning.”⁹

This points to the conclusion that the four modes of accessorial liability are not synonyms but are four separate forms. It was pointed out in that case that the four words must be given their ordinary meanings, but what was this ordinary meaning? There was no explanation. It is not clear whether reference was to legal or everyday language. The legislation itself does not offer any help on this point.

Against this, K. Smith suggests that the words have a legal meaning. He points out that one of the early authorities is Coke’s Commentary on the Statute of Westminster

⁶ Law Commission Consultation Paper No. 131, *Assisting and Encouraging Crime*, (1993). p. 17 (LC. No. 131 thereafter) where it is also mentioned that it would be difficult to find an authority to that effect.

⁷ Smith, K., *MTLCC*, *op cit.*, p. 80.

⁸ *Attorney General Reference No. 1 for 1975*, [1975] Q.B. 773, 780.

⁹ *ibid.*

I, Cap. XIV (1272-1273) which states that the conduct required to be accessories before the fact comes under three headings: *Commandment, Force, Aid*.

Commandment: According to Coke, this refers to all those who incite, procure, set on, or steer up any other to do the act, and are not present when the fact is committed.

Force: This refers to providing a weapon of force to do the act without being present.

Aid: The giving of aid involves all persons counselling, abetting, plotting, assisting, and encouraging the act but who are not actually present. If a person commits one of the three acts and is present, he is a principal.¹⁰ This seems to be the view of Foster who points out that the modes of accessorial liability should not be governed by the ordinary meaning but by the legal import of the words. Therefore, terms used in this area have a technical but not literal meaning.¹¹ The Accessories and Abettors Act 1861, in section 2 uses the terms counsel, procure, and command, but in section 8, uses the four terms of aid, abet, counsel and procure.¹²

J.C. Smith concludes by saying:

“the actual words used are of no significance once it is clear that they were intended to incorporate the common law concept of secondary participation...It was recognised by Coke, Hale and the subsequent writers of authority that it was not necessary for a statute to provide for the liability of secondary participation...Yet, for some reason, Parliament sometimes made express provision and sometimes did not. When express provision was made there was no consistency in the terminology used: but whatever the words, the same concept of the common law applied.”¹³

¹⁰ Smith, K., *MTLCC, op cit.*, P. 30 at note: 58. Also see: Smith, J. C., “Aid, Abet Counsel, or Procure” *op. cit.*, pp. 122-125.

¹¹ Smith, J. C., *ibid.* pp. 124-5, summary of Foster, J., *Crown Law* (Oxford 1762) p. 121

¹² *ibid.* p. 123.

However, later in the same article he puts this another way by saying:

“Assuming that the above arguments are correct and that secondary participation is a common law concept indicated by certain terms of art, it remains necessary to use the words in their ordinary sense to define the nature of the activity which amounts to secondary participation. The law must be expounded to juries and to students. Do the four words, in their ordinary sense, adequately describe the modes of participation recognised by the law?”¹⁴

Unlike K. Smith, he refers to the Oxford English Dictionary to illuminate the meaning of the four terms.¹⁵ This seems to be a move from the position he has adopted above. This issue is very complex and there is no direct answer to the question. Commentators on this point either support the view that the four terms have a technical meaning or gloss over or ignore the point without discussing it. Others state that there is nothing to be gained by attempting to distinguish the meaning of the different words used to describe accessorial liability. This, however, offends the well-known principle that criminal liability requires fair labelling, which means that offences are to be labelled so as to represent the nature and the magnitude of the law breaking.¹⁶

The natural meaning of the term *aid* is to give help, support, or assistance to the principal whether before or at the time of the committing of an offence.¹⁷ This covers a wide variety of actions. It could for example, be very minor assistance, such as selling a knife in the knowledge that it might be used in an offence. Another example

¹³ *ibid.* p. 125.

¹⁴ *ibid.* p. 131.

¹⁵ *ibid.* p. 130.

¹⁶ Ashworth, A., *Principles of Criminal Law* (2nd ed. 1995), Oxford: Oxford University Press. pp. 86-89.

¹⁷ Smith, J.C., “Aid, Abet Counsel, or Procure” *op. cit.*, pp. 130-131.

is to act as a look out to while the principal commits the offence. *Aid* might also be considered serious in the following examples: providing information relating to the daily movement of a public figure in order to assassinate him. *Aid* could also be illustrated in relation to an offence like kidnapping. The principal here might wish to escape the country, and may need another accomplice to arrange this; the assistance of such person may be considered vital if the offence is to succeed. *Aid* may also be given in money laundering offences where a bank manager might advise or assist on how to transfer funds. Again without this assistance the principal may not be able to act.

By contrast, *abetting* covers the activities of persons who incite, encourage, or instigate the principal offender to bring the crime about.¹⁸ This is used to describe the activity of accessories during the commission of the act but since the question of presence has no particular consequence in English law,¹⁹ this can exist before or during the offence. However, this brings us to another unsettled point, namely, the meaning of counsel. What does this form of accessorial liability mean? *Counselling* is used to describe the activities of accessories who offer counsel or advice, or who make recommendation, and usually occurs before the commission of the offence.²⁰ What distinguishes abetting from counselling if presence is immaterial? Can it be that abetting involves causation and counsel does not? Although it is too early to discuss the causal link here, it might be pointed out that English law does not

¹⁸ *Wilcox v. Jeffery* [1951] 1 All ER 464; Smith, J., "Aid, Abet, Counsel, or Procure", *op. cit.*, p.130; Allen, M., *Criminal Law* (3rd ed. 1995,), London: Blackstone Press Ltd. . p.180.

¹⁹ Ashworth, A., *PCL* (1995) *op. cit.*, p.431 where he cites *Howe* [1987] AC 417 as supportive authority.

²⁰ Smith, J.C. "Aid, Abet, Counsel, or Procure", *op. cit.*, p.130.

recognise such requirement. The common law defines the ordinary meaning of counselling as: “Advise, solicit, or something of that sort...”²¹ Andrew Ashworth defines counsel as:

“The ordinary meaning of counselling of may fall well short of inciting or instigating an offence, and cover such conduct as advising on an offence and giving information required for the offence.”²²

Should this suggest that the distinction is in the mens rea? In other words does ‘abet’ refer to accessories who harbour the purpose that the crime should be committed and ‘counsel’ for those who only have knowledge? This is also not clear. The three English law proposals on the subject of accessorial liability, did not include ‘counsel’ in their refining form of accessorial liability which suggests that ‘counsel’ is a form of abetting since there is no further application of the presence rule in English law.²³

The fourth term of accessorial liability used in English law is *procure*. The natural meaning of procurement as John Smith describes it is: ‘to bring about by care or pains, cause, effect, produce, induce, or persuade a person to do something.’²⁴ In *Attorney General’s Reference No. 1 for 1975*, the accused A, had laced the drink of his friend B with alcohol. B was thereafter charged with a drink driving offence, based on absolute liability and not requiring mens rea for conviction. The court described the action of A as ‘procuring’ which meant to the court as: ‘to produce by

²¹ *Calhaem* (1985) 1 Q.B. 808 at 813.

²² Ashworth, A, *PCL* (1995) *op. cit.*, pp. 421.

²³ Law Commission Working Paper No. 43, *Parties, Complicity and Liability for the Act of Another* (1972); Law Commission Report No. 177, *Criminal Law: A Criminal Code For England And Wales* (1989); Law Commission Consultation Paper No. 131, *Assisting and Encouraging Crime* (1993).

²⁴ Smith, J.C., “Aid, Abet, Counsel, or Procure” *op. cit.*, p. 130; The commentator here takes this meaning from Oxford English Dictionary.

endeavour.²⁵ A clear feature of this term is that there is an element of causation which is not found in the other three forms. Also, the facts of the case let us assume that it is restricted to cases where the principal is not aware of the accessory's action.²⁶ This is not the view of Andrew Ashworth, who extends the term to cover other acts of instigation such as shaming someone into committing an offence by taunts of cowardice.²⁷ By contrast, the late Glanville Williams would call such a person as an abettor, which seems to be correct. He says:

“My objection to this word are, first, that it is vague. According to my dictionary, “procuring” traditionally means “bringing about” a sense that the dictionary labels as archaic, since the modern meaning of the word (outside the legal context of complicity) “getting someone or something.” such as a messenger to carry a letter; in law it is used for the procurement (getting) of women for prostitution. No question of complicity need arise in such instance.”²⁸

Also, Williams indicates that cases of procuring can be covered by using the term aid or abet.²⁹ Because of the troubling terminology of the actus reus of the liability of accessories, commentary in English law suggests a movement to other clear terms. It is seen in three proposals: first, the Law Commission Working Paper 43, which selects only two forms of incitement and help.³⁰ Second, the Law Commission Working Paper No. 177 (The English Draft Code for 1989) uses the terms procure

²⁵ *Attorney General Reference No. 1 for 1975*, [1975] Q.B. 773.

²⁶ In fact this is not true, as I shall point in chapter 5, that this term is used under the concept of innocent agency.

²⁷ Ashworth., *PCL* (1995), *op. cit.*, p. 422.

²⁸ Williams, G., “Letters to the Editor: Criminal Complicity” [1991] *Crim. LR* 930-1.

²⁹ *ibid.*

³⁰ The LC. No. 43 defines incitement so as to include encouragement and authorisation. Help, would include assistance given of which the principal was unaware and conduct of a person which leads the principal to believe when committing the offence that he is being helped, or will be helped if necessary, by that person in its commission. See proposition 6.

assist and encourage.³¹ Thirdly, the latest proposal in the Law Commission Consultation Paper No. 131 uses only assistance and encouragement (it is worth noting at this early stage that the Paper No. 131 supports abandoning the derivative nature which is still in force at the moment).

The extent of the scope of accessorial liability is defined well by K. Smith:

“All form of behaviour having the potential to either encourage or to influence the perpetrator or help him carry out the offence can form the basis of complicity, something to be borne firmly in mind when selecting or devising verbal formulae for any codifying effort. Help...may be encouraging as well as facilitative. Encouragement can stretch from advice to persuading or directing a party to act.”³²

The prosecution in England tends to charge accessories with aid, abet, counsel or procure an offence.³³ This might be taken as an evidence of the uncertainty of the complicity's conduct terminology.

Accessory liability and Inchoate Offences

Accessory liability occupies intermediate ground between the inchoate and principal liability.³⁴ This is because in relation to the latter it would occur following the commission of the actual offence. If the principal does not commit the offence in question, there is no accessorial liability (unless then actions amounts to incitement or conspiracy). Also, the main violation of criminal law values occurs in the action by the principal, while the behaviour of the accessory is considered to be less

³¹ The major task of the report was to put common law authorities in statutory shape, which means a codification. However, the drafters were very careful with interpreting criminal complicity and decided not to define the *actus reus* and leave the matter to its ordinary meaning. See Ashworth, A., “The Draft Code, Complicity and Inchoate Offences” [1986] *Crim. LR* 303 at 305.

³² Smith, K., *MTLCC*, *op. cit.*, p. 33.

³³ Wilson, W., *Criminal Law* (1998), London: Longman. p. 584.

harmful: this is a key issue. In relation to inchoate offences, (a term used in English law to refer to *incitement, conspiracy, attempt*.) Offenders are incriminated not for the harm caused but because of the danger of such behaviour.

It is a common law offence to instigate intentionally another person to commit a criminal offence, whether the incitement is successful or not. It can take various forms such as: suggestion, proposal, request, encouragement, persuasion, threats, or pressure.³⁵ The incitement must reach the mind of the person incited,³⁶ and this is also required in accessorial liability when it is based on abetting or counselling.³⁷

There are some differences between accessorial liability and incitements, namely:

Incitement is not part of accessorial liability but it is a separate offence which comes under the doctrine of inchoate offences and the prosecution in England uses incitement to close the gaps left by complicity and conspiracy.³⁸ Accessorial liability is not an offence in itself but it requires the committing of an offence by the principal. Thus there is no question of accessorial liability unless there is proof that the principal offence is actually committed, whether it was completed or attempted. An example would be: A encourages B to kill C. If B does what he had been told by A, both are accomplices: B is a principal and A is an accessory. But, if B does not commit the offence, only A is liable, not as an accessory but as a principal offender in relation to an offence of incitement. The offence of incitement requires an element

³⁴ Smith, K., *MTLCC*, *op. cit.*, p. 9.

³⁵ *Race Relation Board v. Applin* [1973] Q.B. 815.

³⁶ *Krause* (1920) 18 TLR 238 at 243. However, in the case of failure of communication such action might constitute attempted incitement: *R v. Ransford* [1874] 13 Cox CC 9. See Card, R., *Card, Cross and Jones Criminal Law* (13th ed. 1995), London: Butterworths.

³⁷ See *Attorney General Reference No. 1 for 1975*, [1975] Q.B. 773.

³⁸ Ashworth., *PCL* (1995), *op. cit.*, p. 463; LC. No. 131 p. 6.

of persuasion which is expressed in *Race Relations Board v. Applin* (1973) as follows: 'to incite means to urge or spur on by advice, encouragement and persuasion.'³⁹ It is not the case in complicity that advice or counselling would be enough to establish accessorial liability.⁴⁰

The other inchoate offence, which has close connection with accessorial liability is the offence of conspiracy. Statutory conspiracy is governed by s.1 (1) of the Criminal Law Act 1977 which is restricted to conspiracy to commit a criminal offence, and common law conspiracy (conspiracy to: defraud,⁴¹ corrupt public morals,⁴² outrage public decency⁴³). Both accessorial liability and conspiracy are based more on the idea of danger than that of harm.⁴⁴ Also, it can be said that conspirators encourage each other. Although the direct authorities are not clear,⁴⁵ there are some factors which distinguish these inchoate offences from accessorial liability:

Conspiracy is either statutory or a common law offence. In other words, it is an offence in itself, prohibited in terms by the criminal law. Complicity as it applies to the behaviour of accessories does not constitute a substantive offence. To put it another way, criminal law does not consider accessorial action worthy of target but

³⁹ *Race Relation Board v. Applin* [1973] Q.B. 815 at p.825; *Hendricksen and Tichner* [1977] *Crim. LR.* 356. Cf. Buxton, R. J., "Complicity in the Criminal Code" (1969) 85 *L.Q.R.* 252 at 256 which is also adopted by L.C. No. 131 paper pp. 65-72. To note, R. Buxton was a member of the group of that Law Commission.

⁴⁰ Smith, J.C., *Criminal Law* (1996), *op. cit.*, p. 277.

⁴¹ *Scott v. Metropolitan Police* [1974] 3 All ER 1032.

⁴² *Show v. Director of Public Prosecution* [1961] 2 All ER 446.

⁴³ *Mayling* [1963] 1 All ER 687; *Knulier* [1972] 2 All ER 748.

⁴⁴ For more details on conspiracy see Ashworth, A., *PCL* (1995), *op. cit.* pp. 442-470; The Law Commission Report on Conspiracy No. 76 for 1976; The Criminal Law Act 1977 Part I.

⁴⁵ Smith, K., *MTLCC*, *op. cit.*, p. 48.

only in one case when the principal offence is committed. This derivative nature of accessorial liability finds no application in the free-standing basis of conspiracy.⁴⁶

The major distinctive element is the requirement of agreement in conspiracy,⁴⁷ which is not the case in accessorial liability,⁴⁸ also, when one considers the occurrence of both doctrines it is found that conspiracy was established 300 years after complicity.⁴⁹

It is important to mention that it possible for accessories to aid, abet, counsel, or procure an offence of incitement, conspiracy, and attempt because they are criminal offences. While there is no criminal charge for incitement, conspiracy and attempting the action of accessorial liability simply because it not a criminal offence to aid, abet, counsel, and procure alone, but these four types of conduct will lead to the commission of a criminal offence.⁵⁰

⁴⁶ Smith, K., *MTLCC*, *op. cit.*, p. 9.

⁴⁷ *Mulcahy v. R* [1868] LR 3 HL 306; *Wallker* [1962] *Crim. LR* 458, both cited in Smith, J.C., *Criminal Law* (1996), *op. cit.*, p. 303; Ashworth, A., *PCL* (1995), *op. cit.* p. 457; Orchard, G., "Agreement in Criminal Conspiracy", [1977] *Crim. LR* 297.

⁴⁸ Smith, K., *MTLCC*, *op. cit.*, p.48 where he cites *Attorney General Reference No. 1 for 1975*, [1975] Q.B. 773, as an authority for this.

⁴⁹ Smith, K., *MTLCC*, *op. cit.*, p. 47 where he states that conspiracy was not established until the 16th century.

⁵⁰ Smith, J.C., "Secondary Participation and Inchoate Offences" in Tapper, C, (ed.) *Crime, Proof and Punishment* (1981), London: Butterworths. p. 21.

UAE Law

Modes of Accessorial Liability

Historical background:

In relation to the domestic codes (these codes are still applicable only if they do not dissent from provisions of the F. P.C.), I shall take the example of the Emirate of Dubai's domestic criminal law to illustrate the position of other domestic codes (because these are very similar).⁵¹ Chapter Four of the Code contains 6 articles dealing directly with criminal complicity. It is more effective than the Abu-Dhabi 1970 Penal Code which surprisingly contains only one general article.

Article (30) of the Dubai Code, relating the issue of accessorial liability, states:

“The term crime in this chapter does not include any offence punished by imprisonment for the period of not more than one week, or a fine not more than 100 Riyal.”

This indicates that the scope of the liability of accessories is limited only to felonies and misdemeanours, which leaves minor contravention outside the ambit of accessorial liability. Article (31) expressly describes all parties as principal offenders and states that:

1- “When a crime is committed, all persons mentioned below, are considered as accomplices to its committing, as if acted alone, and they can be charged with it:

⁵¹ The reason for this is obvious. Dubai, politically and financially is the most important emirate of the union of the UAE and also a centre of trade and commerce in the Middle East. The Dubai Penal Code for 1970 was considered better drafted in comparison with the other domestic laws.

- a) Whoever commits a crime or any part of its committing, or fails to do anything to prevent the crime,
- b) Whoever commits or fails to prevent the crime with the purpose of letting, assisting another in the committing of a crime,
- c) Whoever assists another in the committing of a crime whether or not he/she is present at its committing. A person is considered an assisting party if he is present at the commission of the offence with the purpose of: terrorising the opponents, strengthening the principal or ensuring that the offence is committed,
- d) Whoever urges, solicits, or instigates another to commit an offence whether or not he is present at its committing.”

There is no express mention of punishment, which indicates that accessories would be liable to the same punishment as the principal offender. Moreover, the Dubai Code makes being an accessory after the fact a separate form of liability in article (34). However, in relation to the current situation, the Dubai Code’s provision on complicity has been abandoned, as it is inconsistent with the F.P.C. rules governing complicity.

The ignorance of UAE domestic codes during the drafting of the F.P.C.:

One might ask why the drafters of the F.P.C. did not take domestic codes into consideration. One commentator points to several reasons, including the fact that the Federal Committee on laws favoured Islamic law and the Egyptian view of criminal liability and that it was therefore easier for them to adopt written codes, such as the Egyptian Penal Code, instead of applying common law.⁵² Moreover, the majority of the committee members were from Egypt and might be expected to have been influenced by *Arabic Nationalism*; this might have disinclined them to emulate the common law. Relations between the U.K. and Egypt were clouded by antagonism

⁵² Al-Muhairi, B.S., *Conflict and Continuity: Islamization and Modernization within the U.A.E. Penal Law*, unpublished Ph.D. thesis, The University of Kent at Canterbury, January 1994. pp. 180-4.

especially among Egyptians, and this was reflected in the legal context, in which Britain achieved only slight modifications of the Egyptian legal system during its occupation of Egypt. For example, William Brunyate, a leading member of the British legal commission to examine capitulatory and mixed courts in Egypt, proposed a plan described as '*a more or less openly avowed Anglicization of the law and the legal institutions of Egypt*' by increasing the British judges; officially using the English language; and by changing the Egyptian preference for French jurisprudence in favour of British legal idea. Egyptian leaders resisted such attempts, which were not accomplished. This is the view Nathan Brown expresses in his study of court and legal matters in Egypt and the Gulf States.⁵³ He provides another example of the British-Egyptian battle to control legal matters, stating:

"Indeed, the introduction of British judges who had often served in India insured that periodic proposals would be made to 'indianize' or 'Anglicize' throughout the history of the occupation. In 1883, even before the National Courts began operation, Benson Maxwell, the British official hired to head the *niyaba* (public prosecution) endeavored to convince Egyptian and British to change course, complaining that he could not operate with the French-style code of criminal procedure. The Egyptian minister of justice replied that 'it is more easy for one legal officer to master the foreign system than for the eighty judges who are employed in the new courts to administer a justice the rules of which are foreign to their whole legal education'. While Maxwell's efforts in 1883 met with no success, limited forays in the direction of Anglicization Egyptian legal justice were made in the following decades. Modifications to the Egyptian law codes under the occupation were often based on British expertise and advice, though changes were relatively minor."⁵⁴

Similarly, Arab judges in the UAE, especially the Egyptians, would support the allegation made by the Egyptian minister of justice in the above example to limit any English method of interpreting the domestic codes.

⁵³ Brown, J., *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (1997), Cambridge: Cambridge University Press. p. 40.

In relation to inchoate offences, the F.P.C. does not adopt this type of liability as a matter of general responsibility, but only does this in relation to selective offences, mostly crimes against the state. However, the Dubai Penal Code of 1970 still applies inchoate offences of incitement, and conspiracy, as found in Indian codes or more closely in English law.

The current situation:

The prevailing position in relation to complicity is found in the F.P.C in 9 articles [44-52]. Article (45) gives the definition of secondary offenders as follows:

“A person shall be considered as an accessory to a crime by causation:

First: if he instigates a crime, and it occurs in accordance with such instigation.

Second: if he conspires with others to commit a crime, and it occurs in accordance with such conspiracy.

Third: if he gives the perpetrator a weapon, tools or any other item which he knows will be used in committing the crime, or if he wilfully aids the perpetrator by any other means or actions which can pave the way for the committing or completion of a crime.”

An ‘accessory after the fact’ is not treated as accessory to a crime under the above articles, but as a principal offender subject to separate liability elsewhere in the F.P.C. (crimes against administering justice, articles: 281-287). The F.P.C., thus, selects only three forms of accessorial liability, namely: instigation, conspiracy and assistance. The term *accessory by causation* is taken from Islamic law to represent the notion of causation, which is not favoured in English law.

⁵⁴ *ibid.* p. 38.

Instigation:

This is the first form of secondary participation liability in the F.P.C. However, the Code does not offer clear guidelines on the meaning of the term 'instigation'. The issue remains largely one of judicial interpretation. However, the courts of the UAE have not made any attempt to interpret this. One of the sources of law available to the courts is legal commentary, which is discussed below.

There are two schools of thought in Arabic legal commentary regarding instigation as a form of accessorial liability, the disagreement between them being related to the proper definition of 'instigation' or other words corresponding to it.⁵⁵

The first school of thought defines instigation as:

“Creating the origin of the idea for the crime, then, confirming it, so that the principal has the resolution to commit the crime.”⁵⁶

According to this analysis, the instigator needs to be the initiator, or the prime mover behind the principal offence, and it appears that counsel, countenance, and advice are not part of their interpretation of the meaning of instigation, which is seen in the requirement of putting the idea for a crime into the hitherto 'empty' head of the principal offender. Also, according to this school, any instigation after the decision of the principal to commit the crime, is not a form of accessorial liability and might only be punished if there is a liability for it, as a separate offence in its own right.

⁵⁵ The view summarised by Mhabis, Abed J., *Almohared Alsoury*, (Arabic. *The Agent Provocateur*) unpublished Ph.D. Thesis, the University of Cairo. 1989. pp. 60-64.

⁵⁶ The view of Husni M, Soroor A and Obaid R. in Mhabis, *ibid.* p. 60 at note 1.

This view is supported by current leading commentators on criminal law. However, although there is no supporting authority, there are some convincing arguments against such a view. First, it seems that the above definition addresses only one example of secondary liability based on instigation, namely an individual act of incitement, but it does not address the issue of collective instigation, whether through joint or separate action. For example, A and B both separately instigate P to commit an offence, A being the first to do so. Should A be convicted because he was the first, and as such is the initiator of the offence, or should they convict B, who might have confirmed the idea of the crime more effectively than the former? No clear answer is found in relation to this in the first school of thought, which shrouds the matter in considerable doubt. Secondly, there is the problem of proving who was the prime mover behind the offence. No one could know for certain which one A, or B swayed the mind of P to carrying out the offence, and in the absence of evidence to the contrary, only P could know whose instigation was more influential. Is it safe to leave the matter in the hands of the actual offender? Also, it might be true to say that in some cases the principal might be reluctant to commit the offence. He could follow either's instructions and either go ahead or not go ahead with the offence. In this example any instigation coming at this stage might be much more important than the instigation which actually turns the principal's mind.

The other school of thought suggests that instigation does not necessarily have to be the prime element of principal liability. It can be established when the instigator supports the idea of the crime, which means that it is a strengthening of resolve to

commit it rather than actually creating the offence.⁵⁷ This seems to be much more practical than the first, as it avoids the complication of the notion of determining who actually caused the offence to be committed. Also, this view makes more sense and is more relevant to the issue.

In spite of this disagreement, both schools require an element of urgency or persuasion on the part of the instigator, which causally leads to the committing of the offence by the principal. Arabic commentary uses the term *power*, to emphasise the nature of the persuasion in the words or actions of the instigator. Why is the matter of instigation so important? This is because legal commentary does not include advice within instigation. For example, Abdulrauf Mahdi says:

“Instigation is an activity against the private will of another, and is done with the purpose to effect that free will, and cause the committing of an offence. This occurs either in initiative or a supportive way but must have an element of *power* which is not found in advice.”⁵⁸

As is seen above, Mahdi distinguishes between instigation and advice by using the word *power*. What does it mean? He does not answer this. It might be true to say that the manner in which instigation is effected reflects the person's mental disposition that the offence should be committed. It is also safe to say that advice of a very general nature does not equal instigation, and that is because it is very common in the Arabic language to use expressions which include advice.

The F.P.C. does not state what instigation means. Thus, liability might be attached to accessories if they have instigated an offence by making a gift, promise, threat, abuse

⁵⁷ The view of Salama, M. and Abu Amair, M. in Mhabis, A. *ibid.* p. 60 at note 2.

of power, used their authority, tricks, issued instructions or given advice if it is strong enough to be instigation. A. Hummad points out that:

“The law does not require an exact form of instigation. Only, it requires that the offence must be committed in accordance with the instigation. This gives the court a wide jurisdiction of the matter.”⁵⁹

What is the position of the F.P.C. on the views mentioned above? Must instigation be initiative as the former school of thought argues? Or it is enough to be supportive as the second view indicates? This is not clear. The Code, however, addresses the liability of accessories as *accessories by causation*, which indicates that the offence must occur in accordance with such instigation. This might be more in line with the first school of thought, mentioned above, but it would depend on the view of the court as to which definition is most suitable. It might be true to say that the orthodox view of instigation might be avoided in assistance where such a broad range of activities might be sufficient for securing conviction.

Elements of instigation by reference to Arabic commentators:

Arabic commentators require certain constituents in instigation such as:⁶⁰

Instigation must be intentional actions (thus excluding recklessness). Instigation also has to be relevant to certain offences, which excludes the example of inciting hatred between groups or people, lead to the committing of an offence. Furthermore, instigation has to be communicated and passed on to certain known persons, which excludes public instigation from the doctrine of complicity. However, it would

⁵⁸ Mahdi, A., *op. cit.*, p. 376.

⁵⁹ Hummad, A., *Alwaseet fee Sharh Qanon Algaza Al Kuwaiti: Alkesm Alam* (Arabic. *Explanation of Kuwait Penal Law: The General Part*) (3rd ed. 1983), Kuwait: Kuwait University Publication. p. 194.

⁶⁰ Mhabis. Abed J., *op. cit.*, pp. 60-64.

appear that whoever publicly instigates others to commit a criminal offence is much more dangerous than one who incites privately. Why is such a distinction made? The answer could be that Arabic commentators emphasise the necessity for actual communication between the parties and treat public instigation as a separate offence not within the scope of criminal complicity. The F.P.C does not give a clear answer to this, which leaves the matter in the hands of the courts.⁶¹

The time factor: Another requirement according to Arabic commentary is that instigation must occur before the commission of principal offence. In other words, the act of instigating during the actual committing of the offence does not necessarily lead to one being punished as an accessory. This is totally different to the view taken by English law. Is there any reliable evidence to support such a view? One commentator, A. Mhaibis attempts to provide arguments in support of this by saying that the nature of instigation requires the instigator to be the mastermind, the driving force behind the principal offence. Moreover, he says that the Egyptian Cassation Court has ruled on two occasions that liability for both instigation and conspiracy as an accessory must occur before the principal commits the offence.⁶²

Against this, with regard to the first point, there is no universal acceptance that being the main driving force represents the true nature of instigation. It is either to be the driving force behind the offence or one who plays a supportive role. Common to both

⁶¹ Cf. Rabia, H., who indicates that public instigation is sufficient to be regarded as an accessorial form of instigation. *Sharh Alquaed Alama le Qanon Okobat Alemarat Alarbia Almutheda: Alguza Alawal, Almbadee Alama le Aljarima*, (Arabic. *Explanation of the General Part of UAE Penal Code: Part One, The General Principles of Crime*) (1993), Dubai: Albayan Press. p. 410.

⁶² Mhabis. Abed J., *op. cit.*, pp. 71-72.

is the idea that they are dangerous forms of behaviour, which infringe the criminal law. Moreover, the empirical evidence leads us to conclude that it is a difficult matter to prove in the question of instigation to determine who is the driving force behind the principal. This is especially true where there is more than one instigator, and where both act differently. Would it be the first, or the second who incites twice, or the third that perhaps has a closer relationship with the principal? Why then is any act other than instigating the crime excluded from the doctrine of complicity, especially when the F.P.C. does not generally adopt incitement liability? As for the latter argument, it is enough to say that neither Egyptian court decisions nor their commentators have any binding force on legal matters in the UAE (I shall examine this topic in chapter 3).

It must be emphasised, however, that in spite of these arguments, it is true to say that the (probable) current position of the F.P.C. in the UAE follows Mhabis's point of view. This is understood from the terms of article (45), which states:

“A person shall be considered accessory to a crime by causation: First: if he instigates a crime, and it occurs in accordance with such instigation.”

But, is it appropriate that only the ‘brains’ behind a crime is punished as an instigator? Should any secondary supporting role be left out of the doctrine of criminal complicity? Is there a solution to this? I shall consider this in dealing with the liability for providing assistance as form of accessorial liability.

Conspiracy:

The nature of conspiracy always causes a lively debate with regard to its full applicability in criminal law doctrine. This is because not only conspiracy, but also incitement, plays a pivotal role between the actual idea for the crime and its commission, which constitutes dangerous behaviour, even though no actual harm is done. Jones and Christie (1996) offer some argument in support of this view.⁶³ The charge of conspiracy is a useful instrument, which encompasses dangerous and undesirable behaviour and the intent behind such behaviour. At the same time, it prevents the committing of the agreed crime and, importantly, conspiracy provides a back up to the law at an early stage of incrimination when the prosecution cannot establish the latter. In other words, conspiracy gives an advantage to the prosecutor when dealing with such a case. However, criminal liability is not only seen from the prosecution's point of view. It is influenced by other considerations such as the actual harm caused by the behaviour in question, and to a lesser extent, by constructive harm in that risks causing harm to society. Thus the commentators referred to above indicate that through conspiracy extreme precursory activities can lead to punishment even if they might not result in the *actus reus* of a crime if committed by one of the parties. Moreover, such liability is based on the party's *mens rea* and here criminal law penalises behaviour by relying more on the mental state of the accused than on *actus reus*.

It might be true to say that the UAE Federal Penal Code adopts a more balanced view to matter. As with instigation there is no general liability for conspiracy under the F.P.C: liability only arises within the doctrine of criminal complicity and also as

⁶³ Jones, T.H. & Christie, M.G.A., *Criminal Law* (2nd ed. 1996), Edinburgh: W. Green/Sweet &

separate liability stated expressly in some offences, mostly offences against the state. This position differs from that taken by English law, discussed above. However, domestic criminal codes such as the Dubai Penal Code of 1970 still adopt general liability for incitement and conspiracy, taking an approach very close to that of the Indian codes and of English law. Having said that, our primary concern here is the Federal Penal Code.

Conspiracy is the second form of accessorial liability under the F.P.C., article (45) of which states:

“A person shall be considered accessory to a crime by causation:
Second: if he conspires with others to commit a crime, and it occurs in accordance with such a conspiracy.”

Apart from the causal link required by the above article, no additional information is furnished by the F.P.C. on the definition of conspiracy. Thus it is left up to the courts and commentators to establish the definition and elements of conspiracy. It must be noted here that the doctrine of conspiracy entered the Arab criminal codes in 1904, firstly in Egypt, then being introduced into other Arab legal systems. This legal concept originated in English criminal law, which is often a frequent source for UAE domestic codes through the Indian Penal Code of 1861. This give rise to the question: should reference be made directly to English law when determining the meaning of conspiracy?

There are grounds for answering this question in the negative. This is because firstly, the UAE legal system has, in general, moved closer towards the Islamic and Egyptian legal system. Islamic law, of course, does not speak in as much detail about conspiracy as Egyptian law does. Secondly, this move to adopt a legal definition would not succeed in practice because most members of the judicial system in the UAE are from Egypt and they might be expected to resist common law authorities and might well protest at the difficulties of tracing common law authorities on conspiracy.

In Egypt, conspiracy takes three forms in the Criminal Code: general liability for felonies and misdemeanours, a form of accessory liability, and, where expressly created a separate offence. The Egyptian Court of Cassation ruled in 1933 that both general liability for conspiracy, and conspiracy as form of accessory liability are identical in meaning.⁶⁴ In the F.P.C. there is no general liability for conspiracy but rather, a form of accessory liability or a separate offence for a specified activity. Should the Egyptian model always be the one to followed on this point? This seems to be true in other Arabic codes, but this fact need not be binding.

I will now shift the focus to the issue of how Arab commentators understand the concept of conspiracy as a form of liability for secondary participation.

⁶⁴ Sorrow, A., *Alwaseet fee Qanon Alokobat: Alkesm Alam*, (Arabic. *Explanation of Penal Code: The General Part*) (6th ed. 1986), Egypt: Dar Alnhda Alarabia. p. 448.

M. Husni defines conspiracy as “An agreement between two or more to commit a crime”.⁶⁵ Others offer a more specific definition of conspiracy by indicating that it is: “A determinative agreement between two or more to commit a crime”.⁶⁶ The reading of this last definition leads us to conclude that there must be an element of insistence or urgency between the parties to a conspiracy, which at the same time tries to avoid the futility of using remote examples,⁶⁷ which do not come to the attention of the penal law system. For example, A agrees with B to steal D’s car, which B does. A is not a conspirator to the crime if he was not determinative although it may constitute instigation. Furthermore, such an element of determination can be established by express or tacit agreement but this has to be before the committing of the principal offence.⁶⁸ As Mustafa indicates, there are two major requirements for of conspiracy:

1) An agreement between the parties, 2) the crime must occur in accordance with such conspiracy, which means causal connection.⁶⁹

An important point to mention is that conspiracy is established or fixed the moment when the agreement is made, and it is not important whether or not there was any discussion as to who would actually commit the offence.⁷⁰

One might ask what form of conspiracy is required? There is no answer in the F.P.C. nor from Arabic commentary. What is required is that each conspirator must hold the

⁶⁵ Husni, M., *Almushraka Aligramia fee Altashreat Alarabia*, (Arabic. *Criminal Complicity in Arab Codes*) (2nd ed. 1992), Egypt: Dar Alnhda Alarabia. p. 296.

⁶⁶ Rabia, H., *op. cit.*, p. 411; Sorror, A., *op. cit.*, p. 477.

⁶⁷ Sorror, A., *ibid.* p. 450.

⁶⁸ Mustafa, M.M., *Sharh Qanon Alokobat: Alkesm Alam*, (Arabic. *Explanation of the Penal Code: The General Part*) (10th ed.1983), Cairo: Cairo University Press. p. 395.

⁶⁹ Mustafa, M.M., *ibid.* pp. 351-352.

⁷⁰ Mahdi, A., *op. cit.* p. 420; Sorror, A., *op cit.*, p. 449.

same level or position as any other party. In other words, the wheel form of conspiracy is not counted as a conspiracy from the point of view the Arabic jurisprudence, especially when the ringleader, who is the hub of the wheel, issues other parties with instructions regarding the main offence. In such a case, his liability might be for instigation rather than conspiracy, because unlike the former, the latter views the parties as being equally culpable.⁷¹

Should this suggest that each conspirator must be aware of the other parties? Some might argue that there should be a direct connection between the parties to show a close or solid relationship to the criminal enterprise, and which is also to make the matter of proof an easy task to the courts. However, most Arabic commentators, supported by the Egyptian Court of Cassation, take an opposing view of this, by indicating that there is no direct rule of the codes to follow such a view, and it is enough to secure the general requirements of accessorial liability such as causation. Furthermore, accessories are punished for their involvement in the crime, not because of their relationship with other accomplices.⁷² This view is also true for instigation and assistance. The F.P.C. supports such a view in article (45), which indicates:

“...An accessory shall be equally liable for the crime whether he contacts the principal directly or through an intermediary.”⁷³

Assistance:

This is the third and the last form of involvement in crime identified by the F.P.C. as a basis of liability in cases of secondary participation. Article (45) of the F.P.C.:

⁷¹ Mustafa, M., (1983) *op cit.*, p. 351.

⁷² Mustafa, M., *ibid.* pp. 358-359.

⁷³ Husni, M., (Arabic. *Criminal Complicity*) *op. cit.*, pp. 340-341.

“ A person shall be considered an accessory by causation to a crime:

Third: If he provide the principal with weapon, tools or any other thing which he knowingly uses in committing the crime, or if he wilfully aids the principal by any other means of preparing, facilitating or completing the acts of crime.”

As usual the F.P.C. does not provides further details of the meaning of aid or assistance. A similar approach is taken in instigation and conspiracy, as mentioned above. Therefore, the matter should be in the hands of courts, but because of restriction on the extent to which the courts may be creative, it is left to commentators to play a major part in defining the conduct element of accessorial liability.⁷⁴

Arab commentary is largely unanimous on the meaning of assistance. This is particularly evident in Egyptian commentary. For example, Husni indicates that assistance means:

“ giving help in any form to the committing of an offence by the principal.”⁷⁵

Others, like, Soroor, share the same view, pointing out that assistance is:

“ established by any subsidiary subvention provided to the principal in order that he commits the crime.”⁷⁶

There is a clear consensus that aid, help, assistance or any form of conduct, which has the aim of supporting a criminal act, is the third form of accessorial liability.

⁷⁴ Usually the meaning of accessorial forms is a factual issue and it is for the courts to decide in each case.

⁷⁵ Husni, M., (Arabic. *Criminal Complicity*) *op. cit.*, p. 302.

⁷⁶ Soroor, A., *op. cit.*, p. 451. Thus, the conduct element of assistance must not amount to the physical element required for the principal offender, which means either committing the *actus reus* of the crime or attempting to commit it. If it happens, then, accessories would be treated as principals.

Moreover this form of liability requires an intention to help the principal offender, and although the legislation does not restrict it to a special form, it has to occur in the preparing, facilitating, or the completion of the principal crime.⁷⁷ Thus aid at the stage of preparation would be imaginable in cases where the accessory provides information to the principal on how to commit the crime, and in many other examples of supplying aid or help prior to the commission of the crime by the principal. Assistance may take the form of providing tools, or weapons to be used in the principal offence, whether before or during its commission. The stage of completion is the final boundary of accessorial liability by assistance in the view of Arabic commentary. It may be established in a wide variety of activities, such as providing a car, aeroplane or ship to transfer the proceeds of an offence, or transport accomplices, or to act as look out for the crime. Further example might be where obstruction is provided to stop the police, ambulance or fire brigade from dealing with the crime.⁷⁸

The relation between assistance and instigation:

It has been stated earlier that instigation under the F.P.C., is understood as:

“Creating of the idea of the crime, then, confirming it, so that the principal have a resolution to commit the crime.”⁷⁹

⁷⁷ Rabia, H., *op. cit.*, p. 415. The broad terminology used in the form of assistance might be due to the legislative lack of control of the wider forms that might be considered as an accessorial form of aid. See: Sidki, A., *Alwageez fee Al Qanon Aljenai*, (Arabic. *Criminal Law*) (1986), Egypt: Dar Almarif. pp. 358-389; Mohammed A. *Qanon Alokobat: Alkesm Alam*, (Arabic. *Penal Code: The General Part*) (*nd.*), Egypt: Dar Almatboaat Algamaia. p. 372.

⁷⁸ Assistance, or the words corresponding it, is difficult to cite in one clear form or category. It differs from a crime to another and depends on the way accomplices provide. See for example Husni, M., (Arabic. *Criminal Complicity*) *op. cit.*, pp. 302- 305. The liability of accessories after the fact is beyond the scope of the doctrine of criminal complicity as it attracts a separate liability under article (284) of the F.P.C.

This was the point of view of the first school of thought, mentioned above, which leaves many inciting activities outside the original requirements of accessorial instigation. The question, then, is: should those activities be regarded as psychological assistance?

The question is answered by the Lebanon Criminal Code of 1943, article (219/ 2) of which states:

“ An intervening party to a felony or misdemeanour is:

- 1) “ Who...,
- 2) Who strengthen the principal intention in any form.”⁸⁰

According to this article some forms of instigation, which are not penalised as instigation, are included within this form of accessorial liability. To put it in another way, the aim of this article is to capture those activities of secondary parties which do not constitute instigation, as Arabic codes and commentators understand instigation to be, and also to hold accessories responsible for supportive or psychological actions done either before or during the committing of the principal offence.⁸¹ This is something not dealt with in Egyptian jurisprudence but covered here in an express provision in the Lebanon Code. The words used in article (45) of the F.P.C. address the question of physical assistance although any other form of assistance might be sufficient to be regarded as accessorial assistance. Why did the drafters of the F.P.C. not consider the Lebanon provision as a possible means of covering the gaps of accessorial liability?

⁷⁹ The view of Husni M. Soroor A. and Obaid R. cited in Mhabis, A., *op. cit.*, p. 60 at note 1.

⁸⁰ Alia, S., *Sharh Qanon Alokobat: Alkesm Alam* (Arabic. *Explanation of the Penal Code: The General Part*) (1998), Beirut. pp. 317-318.

Almost all the commentators, especially the Egyptians, are silent on this issue. However, one of the leading authorities points out that above article of the Lebanon Code is classified as psychological assistance which is also covered by the general provision of assistance in Arabic penal codes.⁸² This view is reasonable and perhaps would be accepted by the UAE courts as it comes from a leading legal commentary, and the wording of article (45) is stated in general terms which would allow psychological assistance to be regarded as accessorial assistance. However, the most important thing is the terminology of the F.P.C. itself. In other words, courts could favour this commentator's view, but it must be borne in mind that the role of interpretation is limited and that only an express legislative provision would settle the argument as to whether or not psychological assistance is a form of accessorial assistance.

One might assume that accessorial assistance spread a wide net for offenders because the numerous ways in which it can be provided. This may be so but it should be kept in mind of the general requirements in the UAE of establishing accessorial liability that both parties often share knowledge and intention linked by the causal requirement. This is different from the English law situation where the absence of a causal connection indicates that any degree of assistance is sufficient to establish accessorial liability.

⁸¹ It was mentioned that instigation under F.P.C. requires the activity to take place before the commission of the crime as it understood from the language of the F.P.C. regarding causation.

⁸² Husni, M., (Arabic. *Criminal Complicity*) *op. cit.*, p. 325.



It is important to note, regarding all the three forms, that the first rule to be established in a case involving accessories is that there must be proof of committing one or more of the three forms indicated by article (45) of the F.P.C. namely; instigation, conspiracy, and assistance. Failure to lead such evidence of this would be for the benefit of the accused. For example, in the Dubai Cassation Court case No 45 For 1994, both the Court of first instance and the Appeal Court ruled out that A is an accessory to fraud by assistance and conspiracy, although that the evidence were not enough to make A responsible as accessory for a crime. At the Cassation Court, the appeal was rejected. The Cassation Court saying:

“ In conspiracy, as a form of accessorial liability, the parties must intend to commit the agreed crime, and there must be an evidence that the form was a conspiracy. Although, it is accepted that implicit proof of instigation, conspiracy and assistance is sufficient but this must be taken from of it... in this case both courts failed to establish that the accused guilt was based on the form of assistance or any form indicated by the Code and the both courts did not allow such defence to the accused. ...The case is rejected.”⁸³

This case illustrate the following points:

Firstly the Prosecution must clearly indicate in the list of charges one or more forms of accessorial liability, depending on the accessory's action, before bringing the case to court. By contrast, there cannot be a general charge using all the forms unless the accessorial actions fulfil such forms.

⁸³ Dubai Cassation Court Ruling No: 45 For 1994, Dubai Cassation Court., *Majalt Alqda wa Altashria* (Arabic. *Court & Legislation Journal*), Dubai. Feb 1997, p. 1175; See also the Federal Supreme Court (F.S.C.) Ruling No. 26 for 1993. UAE University, (Arabic. *Criminal Rulings of the Federal Supreme Court*), UAE: UAE University. Issue No. 15 for 1996, pp. 214-7.

Second, courts regard the absence of specification as to which form of accessorial liability is involved as a ground of appeal. This is in contrast to the view of English law, as described by William Wilson, who writes:

“ In practice, a defendant is likely to be charged using all four words. This is sensible because as long as prosecution show the offence to have been committed in one of the ways, a conviction may be secured. If only one way is used, however, and it's clearly the wrong word, theoretically the indictment must fail.”⁸⁴

Although there is no confirming authority for this, Wilson indicates that the procedures of English law use all forms in cases involving accessories. This is possibly because all parties are regarded as principal offenders and would receive the same punishment. Also it might be due to the principle of ‘social defence’ which means that some vagueness in criminal law is socially beneficial for law enforcement in order to deal flexibly with new examples of criminal behaviour without waiting for clarification from the legislature.⁸⁵ However, the approach in UAE perhaps acts in line with the principles ‘fair labelling’ and ‘maximum certainty’.⁸⁶

These principles adopted by the UAE courts in accessorial liability stress that it is important to act in line with well-known principles, which presumably control codified criminal codes, especially where the liability of secondary parties is conditional upon the committing of the principal crime. So if the principal commits

Wilson, W., *Criminal Law* (1998), *op. cit.*, p. 584.

⁸⁵ Ashworth, A., *PCL* (1995) *op. cit.*, p. 75.

⁸⁶ Andrew Ashworth describes the principle of fair labelling by indicating:

“ It concerns to see that widely felt distinction between kinds of offences and the degrees of wrongdoing are respected and signalled by the law, and that offences are sub-divided and labelled so as to represent fairly the nature and magnitude of the law breaking. ..., it is worth noting that this proposal would have strained the principle of maximum certainty, since one consequence of moving towards broader definition of offences is that they might give wide discretionary powers to the police in enforcement and to the courts in sentencing.” Ashworth, A., *PCL* (1995) *op. cit.*, pp. 86-87.

no crime, accessorial actions are merely normal behaviour and not punished by criminal law unless they constitute a separate offence. Moreover these principles are for the benefit of the accused and would require the prosecution to be much more careful in accessory cases and bring to court only those whose actions are actually being punishable under the doctrine of criminal complicity (however, should this be taken as a golden rule? I shall examine this in chapter 5).

Chapter 2

Causation & Omission

Chapter 2

Causation & Omission

In this chapter I shall examine two related and important issues of accessorial liability, namely, causation and omission in both English and F.P.C. of the UAE. First, I shall examine the concept of causation, or the *but-for* formula. Causation is viewed as a link between a criminal action and its consequences. This concept is considered as a major element in criminal responsibility in deciding the liability of the principal offender but is not, as I shall discuss, an element of accessorial liability. I shall discuss whether causation has any role in English law, a situation rather different than of the F.P.C. In section two I shall examine the concept of omission. Usually omission is not considered as a crime unless there is a duty on the defendant to act. However, although a homicide can be committed by omission some other crimes such as assault requires an action rather than a failure to act. This shows that the criminal law does not regard omission as the same way it regards actions. This rule is related to the liability of the principal offender while accessorial liability, as I shall discuss, does not have such merit.

Section 1: Causation

English Law

The requirements of accessorial liability is that the accessory must 'aid, abet, counsel or procure' the commission of the offence. At this stage it is necessary to indicate that article (45) of the F.P.C., regarding causation in the accessory's actus reus, points to the conclusion that a causal link is required between the actus reus and the crime committed. I shall discuss whether causation has any role in English law, and the reasons why accessorial liability does not consider causation as a deciding element. Clearly, a great number of questions arises in relation to accessorial liability. It is a subject that has the reputation of being one of the most difficult features of common law, which might led one to suggest that this challenging concept, somehow, has only two clear points; derivative theory and equal punishment for the parties involved. In fact, in this area, there is hardly a settled point at all, even in relation to the definition of accessorial liability by means of counselling. There are arguments in favour of conceding that giving advice could lead to the advisor being an accomplice.

Generally speaking, crimes in which the principal offender is being prosecuted, to establish causation it is necessary for the prosecution to prove that it was the offender's act or omission, which caused the prohibited consequence. An example of this is in murder, where there must be proof that the accused caused the death of the victim. In criminal damage, the defendant must damage the property of another. If some other causes intervene, then there may be no liability at all or that there might be a liability for a lesser offence.

It is obvious that the issue of conviction is for the jury to decide. They have to be directed on two principles of causation: that the accused was both the factual and legal cause of the prohibited consequence. Factual causation is sometimes called '*sine qua non*' causation, which means that the consequence would not have occurred as it did *but-for* the accused's conduct. In *White* (1910),¹ the accused put poison in his mother's drink. The next morning she was found dead. At first, the son was charged with murder, but then it was found that the mother had drunk very little of the poison and she had died of natural causes during the night. The son was subsequently found guilty of attempted murder. However the *but-for* test, another name for factual cause, does not mean that the accused will be held guilty on the basis of this test only. A legal cause is needed to complete the causation link. Consider the following example: P asks C if he may drive his car. While P is driving he crashes and C is killed. Can we say here that P caused C's death by driving C's car? A legal cause is established if there is proof that P's driving was a risk to C's life. Sometimes there may be collective causes of one consequence. In *Hennigan* (1971) the accused argued that he did not cause the death of the victim by his dangerous driving because another driver deserved to be considered the cause of the death.² The Court of Appeal, however, rejected his arguments because the accused's contribution was significant enough to justify his being blamed for the event.³

¹ *White* (1910) 2 KB 124.

² *Hennigan* (1971) 3 A11 ER 133.

³ Penny Childs provides a summary of causation in law under English law by referring to the following cases: "*R v. Pagett* (1983): the conduct does not necessarily have to be the main cause of the result, but it must more than minimally contribute to it. *R v. Jordan* (1956): if an event intervenes between the defendant's conduct and the result, it may be a *novus actus interveniens* - a new operative cause-breaking the chain of causation. *R v. Smith* (1959): An intervening event will not break the chain of causation if the defendant's conduct is still an operative and substantial cause of the result. *R v. Cheshire* (1991): To break the chain of causation, the intervening event must be independent and

In returning to the subject of accessorial liability, it would be useful to investigate the causation rule in accessorial liability. In spite of the fact that case law has a major role to play in common law systems, investigating the causation role in complicity, or in other words accessorial liability, gives us the answer that there are a limited number of cases dealing with this important feature of actus reus. Nevertheless, one must analyse these cases with the aim of having a clear picture of the English law approach. For example, *R v. Anderson and Morris* (1966) was a case that was concerned with liability of the accessory for acts which went beyond the partners' common purpose. Lord Chief Justice Parker, however, expressed a view on the problematic causation issue:

“Considered as a matter of causation there may well be an overwhelming supervening event which is of such a character that it will relegate into history matters which would otherwise be looked upon as causative factors.”⁴

What kind of conclusion may be reached from the above view? Must one infer that the causal link for accessories is the same or similar to the one required for the principal offender? There is no clear answer for the real meaning of Lord Parker's statement. For example, K.J.M. Smith commented on this statement in the following way:

“Although not completely unambiguous, the burden of these comments is reasonably clear: actions performed by the principal in furtherance of the common purpose incriminate the accomplice because his association with the principal is a cause of or a reason for the principal's conduct. If this causal relationship were not essential then it would be a logical irrelevance to

unforeseeable.” Childs, P., *Nutcases: Criminal Law* (2nd ed. 1999), London: Sweet & Maxwell. pp. 6-9.

⁴ *R v. Anderson and Morris* (1966) 2 Q.B. 110 at 120.

exculpate the accomplice on the grounds of lack of causation where the principal acted beyond the scope of the common purpose.”⁵

National Coal Board v. Gamble (1959), a leading case that played a major role in determining the mens rea of the accessory, seemed to follow *Anderson and Morrison* in applying the *but-for* test.⁶ Devlin J. said:

“A person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it, and if he does so knowingly and with intent to aid he abets it.”⁷

It seems from Lord Devlin’s statement that there should be a causal link, otherwise the breach of causation would lead to acquittal⁸. However, there is a need for clear authority to answer the question: does causation, according to its general theory, play a major role in determining the liability of accessories in English law?

In *Attorney General’s Reference (No. 1 of 1975)*, an answer was provided to the above question in relation to one of the accessorial forms of liability, ‘procuring’.⁹ In this case, the Court of Appeal held that:

“Since the lacing of the motorist’s drinks was surreptitiously done so that he was unaware of what had happened and there was a causal link between the defendant’s act and the offence by the motorist who would not have committed it otherwise, the defendant had procured the commission of the motorist’s offence; and that, therefore, there was a case to answer so that the defendant was not entitled to the ruling.”¹⁰

⁵ Smith, K., “Complicity and Causation” [1986] *Crim. LR* 663 at 664. It might be true to say that Lord Parker mixed the issue of causation as part of the actus reus with the theory of common purpose which should be dealt with in discussing the mens rea requirements.

⁶ *Gamble* (1959) 1 Q.B. 11.

⁷ *ibid.* p. 20.

⁸ K.J. Smith, says: “the reference to ‘essential’ could be taken to suggest that a prerequisite of liability is the provision of aid without which the principal offence would not have occurred when or in the manner it did.” Smith, K.J., *A Modern Treatise on the Law of Criminal Complicity* (1991), Oxford: Oxford University Press. p. 162. Does this amount to a *but-for* causation?

⁹ *Attorney General Reference No. 1 for 1975*, [1975] Q.B. 773 at 780.

¹⁰ *ibid.* pp. 773-774.

As it transpired, the Court of Appeal held that C had procured P's offence, Lord Widgery saying:

"You cannot procure an offence unless there is a causal link between what you do and the commission of the offence."¹¹

According to Lord Widgery, procuring the principal offence requires a causal link, in other words causation, but again has the question been answered, namely, is causation required in all forms of accessorial liability? There is doubt in Lord Widgery's view, as to whether aiding, abetting and counselling require a causal link. As it has been mentioned, Lord Widgery emphasises that the ordinary meaning of the four terms suggest that there is a difference between each of them.¹² This phrase of 'ordinary meaning' therefore will play a major role in determining accessorial liability in English criminal law, and this was the issue of *Calhaem* (1985). In this case, C counselled P to kill V.¹³ P claimed that when he went to V's house, he had no intention to kill, he had only the intention of faking an attempted murder but following to V's reaction he had gone berserk and had killed V. C was convicted as accessory to the murder. C appealed against the conviction on the grounds that counselling required 'a substantial causal connection between the acts of the secondary party and the commission of the offence.' C claimed that there was no substantial causal connection linking his action with the crime committed. The appeal was dismissed on the grounds of Lord Widgery's views (*Attorney General's Reference No. 1 for 1975*), that, of giving accessorial forms their ordinary meaning and the Court was satisfied that the ordinary meaning of counselling is:

¹¹ *ibid.* p. 780.

¹² *ibid.* p. 779; Millward (1994) *Crim. LR.* 527.

¹³ *Calhaem* (1985) 1 Q.B. 808 at 813.

“Advise, solicit, or something of that sort. There is no implication in the word itself that there should be any causal connection between counselling and the offence...there must clearly be, first, contact between the parties, and second, a connection between the counselling and the murder. The act must be done within the scope of the authority or advice and not accidentally when the mind of the final murderer did not go with his action.”¹⁴

Surprisingly, K. Smith commented on this decision:

“At one point the court seemed to be suggesting that although in counselling, unlike procuring, there was no need to for ‘substantial causal connection’, there was still a need for some cause albeit less than ‘substantial.’”¹⁵

In fact, the Court of Appeal in *Calhaem* did not use the term ‘less substantial causation’. It directly said that there is no causal connection is assumed from the normal meaning of the accessory from of counsel.

However, K Smith continues to say:

“It appears that the Court believed that it was sufficient if the principal’s actions coincided with what counselled rather than being caused by the counselling. Disappointingly...no principled examination of the problems involved in such a view was undertaken by the court.”¹⁶

Because there is little authority on causation, J.C. Smith argues that the discussion of causation is irrelevant. Moreover, he indicates that:

“the fact of many cases where D2 has been held liable suggests that, the offence would have been committed whether he had participated or not and no one seems to have suggested that this should be a defence.”¹⁷

Why does causation not have a grounding in case law? K Smith for example is a strong supporter of a modified form of causation in accessory liability but he makes a reference to three reasons beyond the paucity of case law: the doctrine of common

¹⁴ *Calhaem* (1985) 1 Q.B. p. 813.

¹⁵ Smith, K., “Complicity and Causation” *op. cit.*, p. 665 at note 10.

¹⁶ *ibid.* pp. 665-6.

purposes, prosecution policy, and the problem of proof.¹⁸ Firstly, the doctrine of common purpose, or in other words, unforeseen consequence (I will deal with this issue in full examination later) means that each party in criminal joint enterprise is liable for acts done in pursuance of that common design, provided that he contemplates the additional crime of the primary crime. An example of this is where C instigates P to rob V's house. While P robs the house, V is heard screaming for help; therefore P takes a knife and kills V. C might be convicted for P's crime under the concept of common purpose. In fact under this concept there is hardly any kind of actus reus from the accessory and the perhaps the only important element is the mens rea which is based on knowledge or contemplation therefore there is no need to require causation. Moreover, even the language used to express such a concept or theory of common purpose, is vague and obscure, even as to the issues of contemplation, which suggest that causation does not have an accommodation in this theory.

Secondly, prosecution policy can be viewed as another reason for limited authority in relation to causation in accessorial liability. On this point K Smith writes:

“it could be expected that those cases where the effect of an alleged secondary party's activities was not reasonably clear (or could not be easily assumed) were least likely to be prosecuted: again reducing the possible occasion when causal questions are likely to surface at a trial.”¹⁹

¹⁷ Smith, J.C., *Smith and Hogan Criminal Law*, (18th ed. 1996), London: Butterworths. p.131.

¹⁸ Smith, K., “Complicity and Causation” *op. cit.*, pp. 667-675; *MTLCC*, *op. cit.*, pp. 63-81.

¹⁹ Smith, K., *MTLCC*, *op. cit.*, p. 63.

Thirdly, the last reason K. Smith refers to is the evidential problem that involves the proof of causation in many situations of accessory liability. He assumes that this is a strong rejection for the court to search for a causal role.

Clear authority in case law, both in *Attorney General Reference (No.1 of 1975)* and *Calhaem*, insists that causation is only required in the form of procurement, while the other form of aiding, abetting and counselling does not imply any causal link between accessory's act and the offence committed (Should the prosecution, therefore, clearly indicate which form in charging a person as accessory? This will be considered in chapter 5). It might be pointed out that apart from K Smith, legal commentators are extremely reluctant to attribute any role to causation in the liability of accessories. K Smith's main interest is to establish causal connection but this seems to be a hard task because the theoretical objection, the courts and the legal commentary, are against such approach. Kadish, for example, says:

“Our law has developed two separate bodies of doctrine to determine responsibility for result. Causation for the realm of nature, and complicity for the realm of will. Causation deals with results of person's action that happens in the physical world. Complicity deals with results that take the form of another person's voluntary actions.”²⁰

By contrast, G. Williams says:

“neither incitement nor effective help need to be proved by the prosecution, such requirement would present the prosecution with an impossible task.”²¹

²⁰ Kadish, S., “Complicity, Cause and Blame: A Study in the Interpretation of Doctrine” (1985) 73 *California Law Review* 324 at p.405.

²¹ Williams, G., *Textbook of Criminal Law* (2nd ed. 1983), London: Stevens and Sons. p. 339.

The question then is: why do legal commentators deny any need for causation in accessorial liability? Why, by contrast, is it important in respect of the liability of a principal?

One argument against the causal element is that causation involves the idea of *sine qua non*, the *but-for* test, which means that the result will not occur *but-for* the accused's action. This formulation is appropriate in respect of the liability of the perpetrator, which speaks, somehow, of certainty in focusing on the person who commits the actus reus offence described by the law. Causation here distinguishes between perpetrators and accessories, the *but-for* test is applied to the actus reus of the person who is the most immediate cause of the offence, the direct cause is the cause that produces the outcome. This test cannot be said to govern the forms of accessorial liability, which is considered as indirect cause, a form of conduct that does not actually cause the actus reus of the offence.²²

Another point to support the distinguishable role of causation is that the perpetrator can be said to be the key figure in bringing about the criminal result; accessorial liability depends on his actions. Suppose that C helps P to commit a burglary or instigates him to do so. If P changes his mind and decides not to commit the offence, C cannot be charged with burglary. He might be convicted of conspiracy or incitement and it is still true to say that the occurrence of the perpetrator's offence brings accessorial liability. Incitement or help given to the perpetrator of the offence does not mean that the person inciting or helping causes the result, since such a

²² Smith, J.C., *Criminal Law* (1996), *op. cit.*, p. 133.

person does not engage in the prohibited action. Causation, therefore, is not an appropriate concept to be applied in accessorial liability. As Kadish observes:

“The reason why complicity emerges as a separate ground of liability is that causation doctrine generally cannot deal satisfactorily with results that take the form of another person’s voluntary action. This is because of the voluntary action of a primary party cannot appropriately be said to have been caused (in the physical sense of cause) by the action of the secondary party.”²³

Obviously, causation covers the exact occurrence of an event including time, place, extent and type of harm, all of which cannot be referred to the accessory. However, it is true to say that in some cases the accessory’s help can be viewed as a *sine qua non* factor, that is to say that without this influence or help the perpetrator would not have committed the offence. For example: C hires P to kill his mother, V, with the motive of inheriting her estate. This example shows us that P would not commit the murder if C did not hire him. He has no motive to do what he has done. One can agree that this would satisfy the *but-for* test, even if P was acting fully voluntarily and he was in full control of his actions.²⁴ Having said that, in fact not every accessorial action would fit the *but-for* test such as the accessory who just play a look out role for a crime. Insisting that there must be causation might lead many examples to escape conviction, a result that will not be welcomed by many.

Another strong argument against giving causation a role in accessorial liability is the concept of proof. It could be said that the burden of proof in accessorial liability is the major practical reason for rejecting a role for causation. The proof of the *but-for* test in criminal law must be beyond reasonable doubt. If we accept the fact that the

proof of the perpetrator's liability is one of the major problems of criminal law enforcement, especially when discussing simultaneous causation, then it is more problematic to require proof of successful influence or help by an accessory. The principle of *sine qua non* as a test for proof will leave the prosecution with an impossible task and at the same time it will give the accused an undue opportunity to escape conviction on the ground of lack of causation.

Consider the case of influence 'encouragement.' This is a form of non-physical assistance. It is a connection between two minds, where the words of influence contribute in bringing the idea of the crime to the perpetrator's attention. It is very difficult to prove and would be more difficult if there were more than one instigator or inciter. For example, on two different occasions C1 and C2 encouraged P to rob V (neither C1 nor C2 knows that each of them encouraged V). How can the prosecution apply the but-for test? Should C1 only be responsible because he was the first? It might be that P, the perpetrator, ignored C1's encouragement. Or could C2 be blamed because he managed to influence P's mind? The same approach can be applied to help provided by the accessory where his action merely facilitates the offence or where the evidence shows us that the perpetrator would commit the offence anyway. There is no need for causation, it is enough that the accessory action creates a possibility of success.²⁵

²³ Kadish, S., "Complicity, Cause and Blame"(1985) *op. cit.*, p. 405.

²⁴ The principal offender still has the final decision on his voluntary action.

²⁵ Smith, K., "Complicity and Causation" *op. cit.*, p. 675.

Both case law and commentators offer a hazy and conflicting view in relation to causation in accessorial liability.²⁶ If causation in the *but-for* sense is rejected, there should be a minimum causal contribution to establish accessorial liability. This gives rise to the question: what is the lower boundary of the accessory's involvement in the perpetrator's offence? Should the answer be: did the accessory's action matter? Did he make any difference? Sometimes the influence can strengthen the perpetrator's resolve, even if it does not amount to a *sine qua non*. The same can be said of the accessory's help, that he merely facilitated the commission of offence by the perpetrator. There is no authority for this and I do not know how it works and whether this test is appropriate to solve the problem of causal link. Currently, the prosecution does not have to prove causation; only to prove that what the accessory did amounted to one of the forms of accessorial liability identified by the law (except in procurement). One might suggest, then, that the accessory's action needs only to be more than trivial or not *de minimis* to establish accessorial liability. However, there is no clear authority for this in relation to accessorial liability or how such a principle might operate. The above-mentioned causal formulation gives rise to another question in relation to the causal contribution of accessorial. How can the accessory escape conviction by reason of the defence of causation (if there is one)? Under the current situation the defendant will be wasting time in arguing his innocence that he or she did not cause the principal's offence. This might lead one to insist that the required mens rea must be higher and based on intention in order to introduce some kind of justice and bring about a balance between the power of the prosecution to prove the crime and the ability of the accessory to deny his charge.

²⁶ *ibid.* p. 665.

However, under English law, apart from procurement, the required mens rea is very low and with no such importance attributed to causation, the ability of accessories to escape conviction is limited. In general, apart from procurement, causation does not have any role in deciding the actus reus of accessorial liability. A clear confirmation of this is understood from the decision of the Court of Appeal in *Giannetto* (1997), that a merely saying 'oh goody' by a husband to the suggestion that his wife should be killed, will amount to accessorial liability for murder if committed.²⁷

²⁷ *Giannetto* [1997] 1 Cr. App. Rep. 1 at 13.

UAE Law

Looking first at the *actus reus* requirement, this is generally the external element proscribed by the definition of the offence which must be proved. In other words, it is human conduct, either an act or omission prohibited by the law. Another way of putting this is that the *actus reus* involves the conduct of the accused, its results, surrounding circumstances and consequences. In relation to accessory liability, the *actus reus* of accessory liability is prescribed by the F.P.C., in article (45), which mentions three forms of accessory liability: incitement, conspiracy, and assistance. The commonly accepted formulation in Arab jurisdictions in relation to the unity of *actus reus* in accessory liability is contained in the following formula: Accessorial liability includes various activities played by each party. However, these activities must join or meet together in two concepts which constitute the unity of *actus reus*: criminal result and causation.

Firstly, for a criminal result, such activities arising from the joint enterprise must be presented in the criminal result or, in other words, the crime's outcome. Consider, for example, murder (as a result offence), where a group of offenders intend to kill V. One party, C1 drives the group to the scene of the crime, C2 provides a lethal weapon, C3 keeps watch while C4 finally kills V. All these activities meet together in the result, which in this case is the death of V. Secondly, the establishment of complicity requires proof that there is a causal link or causal relationship between the acts of each party of the joint enterprise and the criminal result. In other words, there must be proof that each party has caused the offence in question. The importance of

the causation rule in this respect is that it is an exploration of the unity of *actus reus* in the case of complicity. For example, M. Husni, indicates:

“The importance of causation between accomplice action and the crime is that the causal link is an element in the accessory *actus reus*, without it there is no *actus reus* and there is no complicity.”²⁸

Moreover he states that:

“There would be a causal relationship between the accomplice’s action and the crime where it is proved that (without the incitement) the perpetrator would not have had the idea of committing the crime, that (without the conspiracy) the perpetrator have not had the courage to commit the crime, or (without the assistance) the perpetrator would not have committed the crime.”²⁹

It seems that this view of attributing importance to causation was supported by the Egyptian Cassation Court in its judgement No. 221 for 1968, where it was held that:

“to convict an offender as accessory to a crime, the court must prove causation relationship between the accomplice’s action and the offence.”³⁰

It seems here in this respect that accomplice’s act must be a *sine qua non*, which means that without the act the result would not have happened as it did. As already has been suggested this view is ignored in English law basically because of practical difficulties. The question is what does causation mean? Cause is something that produces an effect: a cause is therefore a person, a thing or an event that makes something happen.³¹ Consequently, cause is something that has the power to produce a change, motion or action in other things. In criminal law in order to convict a

²⁸ Husni, M., *Almushraka Aligramia fee Altashreat Alarabia*, (Arabic. *Criminal Complicity in Arab Codes*) (2nd ed. 1992), Egypt: Dar Alnhda Alarabia. p. 332.

²⁹ *ibid.* p. 334.

³⁰ Egyptian Cassation Court, Case No. 221, 16 December 1968, Y.19, p.1080. Egyptian Cassation Court, *Majmuat Ahka'am Mahkama'at Alnaqad* (Arabic. *Decisions of the Egyptian Cassation Court*), Egypt.

person who has performed an act which constitutes an offence it must be shown that the result has been caused effectively or, in other words, beyond reasonable doubt by the accused's conduct. Therefore the accused will not be held accountable or guilty unless it is possible to establish a sufficiently direct link between the conduct and the result.

What position does the F.P.C. take in relation to this? In fact there is only a general theory of causation according to the F.P.C. mentioned in article (32):

“A person shall not be responsible for a crime if it is not a result of his own criminal activity: however, he may be responsible for a crime even if his criminal activity and another preceding, contemporary or subsequent cause have contributed to its occurrence, where such a cause is expected or likely to happen in the ordinary course of things. However, if such cause is sufficient to produce the result of the crime, the person shall in this case be responsible only for the act he has committed.”

Accordingly, the prosecution has to prove causation beyond reasonable doubt to convict the accused. However, the article does not distinguish between accomplices. Does this suggest that the general theory of causation is applied both to principals and accessories or that it is linked only to the first? There is no clear answer. Thus one must ask does accessorial liability require causation?

The F.P.C. in article (45), expressly use the term *accessory by causation* when it says:

“A person shall be considered accessory to a crime by causation:

First: if he instigates a crime, and it occurs in accordance with such instigation.

Second: if he conspires with others to commit a crime, and it occurs in accordance with such a conspiracy.

Third: If he provide the principal with weapon, tools or any other thing which he knowingly uses in committing the crime, or if he wilfully aids the

³¹ Longman Dictionary of Contemporary English, (1992) England: Longman. p. 152.

principal by any other means of preparing, facilitating or completing the acts of crime.”

It seems clear from the above article that the F.P.C. requires some sort of causal link between the accessory’s action and the offence. It is also true to say that the general theory of causation, which is mentioned in article (32), appears to suggest that it should be applied when the doctrine of complicity is needed for conviction since there is no separate causation theory in the F.P.C.³² This is what appears from an examination of the F.P.C., which might lead one to assume that this approach of the general theory of causation is the only one possible approach since the rule of legality plays a protective role in criminal law. Having said that, under this approach many accessories, if not all, will escape conviction if the literal to causation is applied, unless the UAE courts interpret the above article. I shall discuss below an uncompleted attempt made by legal commentators to avoid the problem, while UAE courts are still far away from even noticing that there is a problem.

As has already been said, there is a strong view that causation plays a major role in accessorial liability. For example, as mentioned, Husni supports a causal role. However, after such support, he complicates the situation by expressing the view that causation in complicity is treated in a different way from causation in single offender crimes or crimes other than accessorial liability.³³ It seems Husni’s latter views may be cleared by a Lebanese Professor, M. Alojy, even though the latter’s views might not remove all the vagueness of the situation. Alojy says:

³² Rabia, H., *Sharh Alquaed Alama le Qanon Okobat Alemarat Alarbia Almutheda: Alguza Alawal, Almbadee Alama le Aljarima*, (Arabic. *Explanation of the General Part of UAE Penal Code: Part One, The General Principles of Crime*) (1993), Dubai: Albayan Press. p. 371.

“courts do not spend much time analysing causation in relation to accessorial liability, only general expressions are used which would give an impression that there is a causal relationship.”³⁴

Moreover, he continues to say:

“It is often that legal commentary requires an objective principle to establish causation between accessory’s action and the result, this objective principle is based on the idea of ‘potential influence’ in spite of the fact that it is not expressly mentioned by the scholars.”³⁵

The view of Alojy represents the opinions of most Arabic legal commentary regarding the role of causation in accessorial liability. In fact, there is no serious attempt by legal commentary to clarify what the above requirement of ‘potential influence’ means (it might be possible that it is similar to the notion of ‘making the difference’ mentioned earlier by K. Smith which also is not fully expressed. This can lead someone to presume that causation is not an issue because of the problems that it causes). It must be pointed out that under the F.P.C. the term *accessory by causation* is perhaps the only express term used by an Arabic penal code which insists that causation must be investigated, otherwise an accessorial case must collapse. Unfortunately, neither Arabic commentary nor domestic judicial opinion offers any answer on how causation operates. Even legal commentators such as Husni, suggest that causation means: did the accessory’s action matter? Did he make any difference? If so, then there is a causal link even if it does not amount to a *sine qua non*, and this differs from case to case. It is not totally clear how the F.P.C. treats causation as an element of accessorial liability. However, I believe that since the

³³ Husni, M., (Arabic. *Criminal Complicity*), *op. cit.*, p. 334.

³⁴ Alojy, M., *Alqanon Aljenai Alam: Alguza Althani, Almasulia Aljenaia*, (Arabic. *Public Criminal Law: Part Two, Criminal Responsibility*) (2nd ed. 1992), Lebanon: Nofal Publication. p. 125.

³⁵ *ibid.* p. 127.

F.P.C. does not include any such terminology, (of potential influence or making the deference), the concept of causation is governed by article (32) and similarly applied on both the principal offender and the accessory. I suggest this in spite of the fact that this might lead many apparent accessories to escape conviction because of a causal defence but the rule of legality forces one to provide such an opinion regarding the current situation of the F.P.C. of causation in accessorial liability. I think that the F.P.C. is rather different, in this regard, from other Arabic criminal codes by implicitly indicating that causation, in accessorial liability, is based on the notion of *sine qua non*, which seems to be the required test under the general provision of causation in article (32).

Having said that, I believe that causation should not be regarded as element of accessorial liability, and any future amendment of the F.P.C. should take this into consideration. Currently a defendant should rely on causation as defence if he believes that his action fails short of what is required in article (32) to avoid liability, unless UAE courts explain the law on this point.

Section 2: Doing nothing: ‘accessorial liability through inaction’

This section examines the scope of omission in accessorial liability with the aim of exploring the minimum standard required for accessorial liability. The issue is approached from the point of view of clarifying the actus reus in such a case. The

discussion below deals with the circumstances in which an accessory becomes liable without doing any positive act.

English Law

The issue of inaction in aiding and abetting has been discussed in many cases and academic commentary. It comes under two headings: mere presence and omission based on duty and control.

Mere Presence:

If a person is merely present at the commission of an offence and is doing nothing, but his presence follows on an agreement to afford assistance if necessary, he is an accessory to that offence.³⁶ The effect of presence even if doing nothing, is to lend a type of encouragement to the principal, indicating perhaps that because of the presence of another the offence may be committed more easily. In other words it offers moral support which can also create fear on the victim to such an extent that he cannot respond as he otherwise might to avoid the crime.³⁷ But should every kind of presence be sufficient to give rise to culpability?

³⁶ Smith, K., *MTLCC*, *op. cit.*, p. 36, citing Foster, J., *Crown Law* (1762), Oxford. p. 350.

³⁷ Smith, K., *ibid.* p. 25 at note 32 where he cites the opinion of Bromley CJ in *Griffith* (1553) who indicates that presence has a power to suspend the courage of the victim to respond or at least to escape.

Suppose that A is going about his business and suddenly realises that there is a gathering nearby. His curiosity leads him to find out what is going on. Is he an accessory if the gathering proves to be illegal? Would his presence amount to an aiding and abetting of the offence? There is no doubt that accidental presence is not sufficient to render a person an accomplice to the offence, which has taken place. Foster points out that:

“therefore if A happening to be present at murder for instance, and taken no part in it, nor endeavoreth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry against him, this strange behaviour of his though highly criminal, will not of itself render him either principal or accessory.”³⁸

On this point, Cave, J. in *R v. Coney* (1882) says:

“Where presence may be entirely accidental, it is not even evidence of aiding and abetting.”³⁹

It is difficult to accept that accidental presence is a way of becoming an accessory, as this would create on citizens a duty to report the offence and would be also constitute a limitation on freedom of movement which is neither the aim of criminal law, nor it is accepted in modern life. In short, extending accessorial liability provisions to accidental presence cases would be too wide application of penal law.⁴⁰

This gives rise to the question: is non-accidental presence a conclusive evidence of participation? For example, A sees an advertisement on a wall that there is to be a car race between some youths, and he attends this. Should he become an accessory by

³⁸ Foster, J., *Crown Law* p. 350.

³⁹ *R v. Coney* [1882] 8 Q.B. 534 at p. 540.

⁴⁰ Law Commission No. 43 indicates that “a person does not become an accessory to an offence if the offence is so defined that his conduct in it is inevitably incidental to its commission and such conduct

virtue of this non- accidental presence? English law recognises some authorities for this proposition.

In *R v. Coney*, (1882)⁴¹ the defendant and others were present together with large crowds which had gathered to see an illegal fight. It did not appear that they took any part in any administration of the fight, nor did they do or say anything. The jury were directed that all persons who were not passing by but were present were guilty of assault through encouragement. Because of this, the jury found them guilty but added, that they would not have found them aiders or abettors if the judge had not directed them to do so.

Three of the eleven members of the court assumed that a jury was bound to presume intentional encouragement as a consequence of intentional presence at a prize fight unless there was cogent evidence to the contrary.⁴² However the conviction was quashed by eight members who stated that presence is no more than *prima-facie* evidence from which the jury could infer encouragement, that is to say, that deliberate presence is not conclusive evidence allowing conviction as an accessory, it is only one piece of evidence and it should be left to the jury to consider.

Hawkins J., said:

“ some active steps must be taken by word or action with intent to instigate the principal or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence by misinterpreted words or gestures, or by his silence or non-interference or may encourage

is not expressly penalised.” Law Commission Working Paper No. 43, *Parties, Complicity and Liability for the Act of Another* (1972). Proposition 8. p. 65.

⁴¹ *R v. Coney* [1882] 8 Q.B. 534.

⁴² Smith, K., *MTLCC*, *op. cit.*, p. 37 at note 82.

intentionally by expression, gestures or actions intended to signify approval. In the latter case he aid and abets.”⁴³

In *Wilcox v. Jeffery* (1951),⁴⁴ the defendant was present at a concert given by an American professor of saxophone who was performing illegally in contravention of the Aliens Order 1920 which did not allow a foreigner to take any employment, paid or unpaid, without permission. It was held that his presence was sufficient evidence of encouragement to establish accessorial liability. An analysis of the facts of this case leads us to the conclusion that:

a) deliberate presence , although *prima-facie*, it would strengthen the verdict since he attended the concert and made payment; an act which he knew for certain that it was illegal, and also the fact that he reported the concert latter in the newspaper in which explored his interest in the performance (thus, one can suggest that this case was more based on action rather than omission). Lord Goddard CJ. said on this point:

“It might have been entirely different, as I say, if he had gone there and protested, saying: ‘the musicians’ union do not take you foreigners coming here and you ought to get out of the stage..., it might been some evidence that he was not aiding and abetting. If he had gone as a member of a claue to try to drown noise of the saxophone, he might very likely be found not guilty of aiding and abetting, in this case it seems clear hat he was there, not only to approve and encourage what was done, but to take advantage of it by getting copy for his paper.”⁴⁵

b) In a sense, the facts in this case are different from those in *Coney*. The defendant knew of the musician’s arrival and went to the airport to greet him, which expresses an interest in the commission of the illegal performance and this would also increase the sale of the paper after the publication of the concert of the musician.

⁴³ Hawkins J. in *R v. Coney* [1882] 8 Q.B. 534 at 557.

⁴⁴ *Wilcox v. Jeffery* [1951] 1 All ER 464.

In *Allan* (1963)⁴⁶ the defendant was present when some of his friends got into an affray. He did not do anything but nursed a desire to help if his help were needed. However, his assistance was not required. The trial judge directed the jury to convict the accused if it was proved that he had decided to help if his help was needed even if he was totally passive and did not do anything. The accused appealed on the ground of misdirection. The Court of Criminal Appeal quashed the conviction and allowed the appeal. The Court held, following *Coney*, that there was misdirection by the trial judge because he had said that the holding of an intention to help was conclusive evidence of aiding and abetting. Therefore, the defendant was not guilty of making an affray in the absence of any evidence of encouragement. Presence was only *prima-facie* evidence and should be left to the jury to decide upon.

It is clear from this case that there must be active steps on the part of the accused; deliberate presence alone would not be sufficient to convict a person of accessorial liability. In this case the Court did not convict the accused because if it did there would be a new principle which would lead to convict people upon their thoughts, which would be a huge departure from the accepted policy of English criminal law in this matter.

⁴⁵ *ibid.* cited in Smith, J.C. & Hogan, B., *Smith & Hogan Criminal Law Cases and Materials*, (6th ed. 1996) London: Butterworths. p. 230.

⁴⁶ *R v. Allan* [1963] 2 All ER 897.

In *R v. Clarkson and Carroll* (1971)⁴⁷ A1 and A2, soldiers, heard a German girl being raped by another, in a military camp, entered the room and remained there but did not give any direct physical or verbal encouragement. However, they were charged with aiding and abetting rape. The Martial Appeal Court allowed their appeal and held that A1 and A2 were not guilty of aiding and abetting the rape.

Megaw LJ said:

“The jury has to be told by the judge, or in this case the court-martial has to be told by the judge-advocate, in clear terms what it is of which the jury or the court-martial, as the case may be, must be sure as matters of inference before they can convict of aiding and abetting in such a case where the evidence adduced by the prosecution is limited to non accidental presence...It is not enough, then that the presence of the accused has, in fact, given encouragement. It must be proved that that the accused intended to give encouragement; that he wilfully encouraged.”⁴⁸

It appears that deliberate presence or attendance during an offence is not conclusive proof of encouragement, it is only prima facie evidence and it is for the jury to decide.⁴⁹

It would be true to say that a verdict of aiding and abetting differs from case to case and depends on the circumstances present in the case in question.⁵⁰ For instance, *Wilcox v. Jeffery* is a clear example of a case in which the accused showed through his assent or consent that he wanted the offence to take place. This differs from

⁴⁷ *R v. Clarkson and Carroll* [1971] 3 All ER 344.

⁴⁸ *ibid.* p. 347.

⁴⁹ To hold otherwise, this would estimate a general duty to take a reasonable step to prevent the offence from happening, which is not the case in English law. See Ashworth, A., *Principles of Criminal Law* (2nd ed. 1995), Oxford: Oxford University Press. p. 416.

⁵⁰ Cf. Glanville Williams argues of what might be such circumstances. He says: “What is the point of saying that presence is evidence, if it cannot be taken to be enough evidence? If it is enough evidence in some circumstances, what are those circumstances?” A valuable point but without a clear answer. Williams, G., “Which of You Did it?” (1989) 52 *Modern Law Review* 179 at 189.

Coney in which there was no approval of the offence.⁵¹ All in all, the question of what amounts to encouragement by mere presence should be a question of fact in each case for the jury, and is not one of law.⁵²

Omission:

The second related area of inaction in secondary party liability is failure to act where there is duty to intervene or where a right of control exists.⁵³ In general, English criminal law favours action as a mode of committing an offence but occasionally extends incrimination from acts to omissions.⁵⁴ This accords with the conventional view principle, which restricts liability for omission to a minimum. It conflicts, however, with social responsibility theory, which equals action with omission in committing an offence. Thus, English law has tended to restrict criminal liability for omission to the range of situations in which a duty to act can be identified.⁵⁵ For example, if a stranger watches a child drown in a shallow pool from which he could easily rescue him, he commits no offence because there was no duty to rescue.⁵⁶

⁵¹ Suppose that there was an applause, countenance or cheering in *Coney's* case, would this amount to encouragement? Hawkins J. In *Coney*, *op. cit.*, at 557 said "...or he may encourage intentionally by expression, gestures or action intended to signify approval" Smith, K., *MTLCC*, *op. cit.*, p. 37 at note 82, believes that applause according to this would amount to be classified as aiding and abetting; Ashworth, A., *PCL* (1995), *op. cit.*, p. 416.

⁵² Huddleston, B. in *Coney*, *op. cit.*, at 561. This leaves us with an unclear answer. What is the sufficient mens rea of mere presence? Should we adopt the language of intention said in the previous cases to assume that the mens rea required is either purpose or oblique intent, or should we presume mens rea on knowledge that presence or attendance might encourage the offender?

⁵³ See: Smith, J.C., "Liability for Omission in Criminal Law" [1984] 4 *Legal Studies* 88; Ashworth, A., "The Scope of Criminal Liability for Omissions" (1989) 105 *L.Q.R.* 424; Williams, G., "Criminal Omissions- The Conventional View" (1991) 107 *L.Q.R.* 86.

⁵⁴ Ashworth, A., "The Scope of Criminal Liability for Omissions" *op. cit.*, 424 at 426.

⁵⁵ Ashworth, A., *PCL* (1995), *op. cit.*, p. 47.

⁵⁶ Card, R., *Card, Cross and Jones Criminal Law* (13th ed. 1995), London: Butterworths. p. 54.

A person becomes an accessory to an offence by omission to act, provided that the person was under a duty to act recognised by the criminal law, which he failed to fulfil.⁵⁷ These duties may arise under statute but more commonly they arise under common law.⁵⁸ Although this principle relates to the liability of a perpetrator, it is applicable to the liability of an accomplice.⁵⁹ Examples of situations in which a duty to act will exist include: holding a public office which requires a duty of care to others,⁶⁰ parents towards their children,⁶¹ voluntarily undertaking the care of another who is unable to care for himself,⁶² and situation in which there is a contractual duty of care.⁶³

In *Du Cross v. Lambourne* (1907)⁶⁴ the defendant was charged with driving his car at a dangerous speed, contrary to section 8 of the Motor Car Act 1903. It could not be proved whether the defendant was actually driving or another person was the driver at the time. Some witnesses said that the defendant was the driver, others stated that

⁵⁷ *ibid.* p. 54.

⁵⁸ *ibid.* p. 55.

⁵⁹ *ibid.* p. 555.

⁶⁰ *Dytham* [1979] Q.B. 722. A police officer was convicted of the common law offence of misconduct in a public office when he failed to intervene to stop a man being kicked to death. Under clause 27 (3) of English draft Criminal Code 1989 (which takes very broad understanding that omission could be found in every duty case) the police officer might be convicted of murder as an accessory instead of that simple offence.

⁶¹ A parent's duty to ensure the health and safety of their children is governed by Children and Young Persons Act 1933, in s.1. However, there is no English authority under common law on this effect. See Smith, J.C., *Criminal Law* (1996) *op. cit.*, p. 51. Some commentators tend to extend such duty beyond family scope to cover members of the same household. See: McCall Smith, R.A. & Sheldon, D., *Scots Criminal Law* (1992), Edinburgh: Butterworths. p. 30. Others indicate that it is possible to extend this duty to cover a close relationship such as other relatives, domestic, business and children above the age of responsibility. Smith, J.C., *Criminal Law* (1996) *op. cit.*, p. 51. For example, in *R v. Russell* [1933] VLR 59, (an Australian Case) a father was convicted of manslaughter to his wife suicide, who also killed his children, on the ground that he failed to stop the wife to do so. He was convicted as principal although that there was an opinion that he should be convicted as an accessory.

⁶² *Nicholls* [1874] 13 Cox CC 75., *Stone and Dobinson* [1977] Q.B. 354.

⁶³ In *Pittwood* [1902] 19 TLR 37, the accused, a level crossing keeper, failed to close the gate when a train was approaching and because of this a person was killed. He was convicted with manslaughter on the basis that he omitted to act where his contract required a duty to do so.

the car was driven by another. It was immaterial to the court whether the accused was driving or not, he knew that the speed was dangerous and had done nothing to prevent the offence from happening. Alverstone LCJ said:

“It is impossible to come to any other conclusion than that the court was satisfied that the appellant was doing acts which would amount to aiding, abetting, counselling or procuring.”⁶⁵

The other judge of the divisional court, Darling J, said:

“...was precisely the same thing as if he did it himself. He had authority and power to interfere but he did not do so although he knew the car was being driven at excessive speed.”⁶⁶

It is made clear in this case that the owner's failure to exercise control over the driver of a car may be sufficient grounds of incrimination.⁶⁷ However, it is said that this is a contradictory or ambiguous case.⁶⁸ For example, Glanville Williams refuses to consider *Du Cross v. Lambourne* as a reliable authority because it merits certain serious theoretical objections, namely: the decision extends the liability of omission by encouragement where there is no proof of both encouragement and direct intention to encourage. Also he points out that many people are reluctant to criticise others to their face and in such a case and although it may be said that the owner did not discourage the driving, does that equals encouragement?⁶⁹ When the person is not the owner or the possessor of the vehicle but a mere passenger, his omission to

⁶⁴ *Du Cross v. Lambourne* [1907] 1 K.B. 40.

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ Gillies, P., *The Law of Criminal Complicity* (1980), Australia: The Law Book Company Ltd. p. 132.

⁶⁸ Smith, K., *MTLCC*, *op. cit.*, p. 40.

⁶⁹ Williams, G., “Letting Offences Happen” [1990] *Crim. LR* 780 at 785.

prevent the criminal driving will not make him an accessory.⁷⁰ Glanville Williams comments on the duty of ownership in these terms:

“ An owner who is not sitting in the car is not a special target of the law (he is presumably not implicated if he lends his car to a person whom he knows to be a careless driver); neither is a passenger in most instances; but a person who is both owner and passenger can be convicted.”⁷¹

In *Rubie v. Faulkner* (1940)⁷² a driving instructor failed to act to prevent a learner driver from committing an offence of careless driving in which the driver collided with a motor lorry. The instructor was convicted of aiding and abetting. He appealed on the ground that he had no control over the car and did not tell the driver to perform the manoeuvre which led to the accident and also he had no time to correct the mistake. However, the conviction of aiding and abetting was upheld, Hilbery J. saying:

“ In this case it was found that the supervisor could see the driver was about to do the unlawful act of which he was convicted and the magistrates found that the supervisor reminded passive ...for him to refrain from doing anything when he could see that unlawful act was about to be done, and his duty was to prevent an unlawful act, if he could, was for him to aid and abet.”⁷³

This decision was an interpretation of the Road Traffic Act and its regulations, and is not an authority for the whole field of English criminal law.⁷⁴

⁷⁰ In *D v. Pearsons* [1960] 2 All ER 493, D 1 aged 15 stole a motor cycle and offered A, a lift. A was charged with aiding and abetting D in driving without insurance. The divisional Court held that a mere passenger could not be held liable to D's offence. Lanham D., “ Drivers, Control And Accomplices” [1982] *Crim. LR* 419 at 421.

⁷¹ Williams, G., “ Letting Offences Happen” *op. cit.*, p. 180.

⁷² *Faulkner* [1940] 1 KB 571.

⁷³ *ibid.* p. 575. Also Lord Hewart L.C.J. *ibid.* at p. 288. Cf. G. Williams “Letting Offences Happen” *op.cit.*, p. 783.

⁷⁴ Williams, G., “Letting Offences Happen” *op. cit.*, p. 784.

In *Tuck v. Robson* (1970)⁷⁵ the accused, a licensee of a public house, whose licence prohibits the drinking of alcohol after 11:10 p.m. was found guilty as an accomplice to his customers' breach of the Liquor Act. In fact, he called 'Time' at 11:00 p.m., and switched off some lights. Moreover, he asked the customers to leave but the police arrived at 11:23 p.m., and found some customers were still consuming drinks. His appeal was quashed and the court did not consider his asking customers to leave as an effort to avoid conviction holding that he had failed to exercise his right of control.⁷⁶ Lord Parker said:

"The question as it seems to me, is whether the magistrate as a reasonable tribunal was entitled in all the circumstances to draw the inference that there was passive assistance in the sense of presence with no steps being taken by the licensee to enforce his right either to eject the customers or at any rate to revoke their licence to be upon the premises. In my judgement the magistrate was entitled to draw that inference, and accordingly I would dismiss this appeal."⁷⁷

The above three cases were considered authorities by the English Draft Criminal Code (1989) which indicates in clause 27(3):

"Assistance or encouragement includes assistance or encouragement arising from a failure by a person to take a reasonable steps to exercise any authority or to discharge any duty he has to control the relevant acts of the principal in order to prevent the commission of the offence."⁷⁸

This is in complete contrast to the view of LC. No. 43 which indicates that:

⁷⁵ *Tuck v. Robson* [1970] 1 W.L.R. 741; [1970] 1 All ER 1171.

⁷⁶ Card, R., *Criminal Law* (1995), *op.cit.*, p. 555.

⁷⁷ Lord Parker in *Tuck v. Robson* [1970] 1 WLR 741 pp.746-747.

⁷⁸ Law Commission Report No. 177, *Criminal Law: A Criminal Code For England And Wales* (1989). Cf. Law Commission Report No. 131 suggests that omission, under accessorial liability, should be based on criminal intention, and knowledge is to be considered as a *prima-facie* evidence from which the jury could infer intention of accessorial liability in omission. Law Commission Consultation Paper No. 131, *Assisting and Encouraging Crime*, (1993). pp. 22, 105, 131.

“A person who is in a position to prevent an offence, because he is in control of property or for some other reason, is not to be taken to be an accessory merely because he fails to prevent an offence.”⁷⁹

G. Williams, who was an author of LC. No. 43, says:

“What is there in case law to have caused the commission to suppose that their proposal about authority to control merely restate the present law? So far as the decided cases show, an authority to control is supposed to arise in certain cases either from a) the interpretation of a statute (the supervision example) or b) the ownership of property. c) with one dubious exception (control arising from status or contract), no other application has to my knowledge been made of the idea that an authority to control can produce liability for complicity; but the Draft Code sets no limits to it.”⁸⁰

Liability for aiding and abetting by an omission is one of the most difficult subjects in accessorial liability. The problem is not only in the *actus reus*, it also touches the issue of the mental element. There is a lack of precision in determining when a person is under an obligation to intervene.⁸¹ Keith Smith summarises the issue of omission:

“Discrimination between what might be considered deserving and undeserving cases for criminalization may, it has been suggested be approached in two ways: by declaring that failure to exercise a civil right to control, in itself, is insufficient basis for liability, though it may be sufficient when coupled with an ‘additional factor’, or by affirming that simple failure to exercise ‘authority or discharge a duty’ may incriminate. But for both judicial creativity would determine what the additional factor or cases of authority were... the need remains for a conceptional basis capable of selecting appropriate cases for punishment.”⁸²

⁷⁹ LC No. 43, proposition 8. p. 9 and 65, which is an adoption of section 2. 06 (6) (b) of the American M.P.C.

⁸⁰ Williams, G., “Letting Offences Happen” *op. cit.*, pp.782-3.

⁸¹ Finn, J., “Culpable Non-Intervention: Reconsidering the Basis For Party Liability by Omission” (1994) *Criminal Law Journal* Vol. 18, p.106. Moreover, it is possible to say that omission creates a problem in establishing the defence of withdrawal. For example, the accused in *Tuck v. Robson* called ‘time’ and switched off some of the lights but the Court found that this was insufficient to avoid being an accomplice. What might the Court have expected the accused to do? Was it sufficient to hire two large bodyguards to throw the customers out? (as an example of requiring a physical intervening).

⁸² Smith, K., *MTLCC*, *op.cit.*, p. 46.

He goes further to suggest that two factors should be acknowledged: a) relationship between the parties and that the accessory have a dominant role over the principal. b) The likelihood of substantial risk.⁸³ However, both factors could be easily used in wide terms by court and thus the only solution is to have certain measures for the courts to follow and this is the responsibility of the legislature which, for issues of English law, in the UK is the Westminster parliament.⁸⁴ Or as suggested by LC. No. 131, accessorial liability in omission should be based criminal intention rather than knowledge which, at the same time, should be considered only as a *prima-facie* evidence from which the jury could infer intention of accessorial liability in omission.⁸⁵

⁸³ *ibid.* p. 47.

⁸⁴ Williams, G., "Letting Offences Happen" *op. cit.*, p.787. Cf. Gillies, P., *Criminal Complicity*, *op.cit.*, p. 136.

⁸⁵ LC. No. 131, *op. cit.*, pp. 22, 105, 131.

UAE Law

It is worth mentioning that judicial decisions are not binding authority in the UAE. It is probably the case that only a decision of the F.S.C. is a binding precedent in future similar cases,⁸⁶ where the court has jurisdiction.⁸⁷ Thus, case law in the UAE criminal system does not play a similar role to the English precedent. However, the decision may be useful when interpreting the F.P.C. In relation to the scope of inaction in accessorial liability, there is no reported case of mere presence nor omission under a duty to act. It is advisable to examine the issue in the F.P.C. articles.⁸⁸

Article (31) states that:

⁸⁶ Al Mansoori, A.E.M., *The Law of Arrest and Similar Procedures: A Comparative Study*, unpublished Ph.D. thesis, The University of Edinburgh 1997. p. 20. Cf. Butti Al-Muhairi who argues that there is no written legal rule that makes the decision of the F.S.C. binding and that courts, in general, tend not to follow its ruling. He calls the legislature to expressly state that the decisions of the F.S.C. are binding. Al-Muhairi, B.S., "Conclusion to the Series of Articles on The UAE Penal Law"[1997] *Arab Law Quarterly*, Vol.12, Part 4. p. 386.

⁸⁷ Two of the seven emirates has a domestic judicial jurisdiction, Dubai and Ras-alkhima, but also apply the F.P.C. In Dubai there is a Court of Cassation for civil and criminal matters. Is possibly true to say that this Court plays strong role as of the F.S.C. and in more than one occasion it did not follow the F.S.C. on matters related to the Federal Cods. For the role of the F.S.C. and Dubai Cassation Court of see: Al Mansoori, A., *op.cit.*, pp.10-20.

⁸⁸ In relation to the domestic penal codes of the UAE, it is worth mentioning that the Dubai 1970 Penal Code expressly states certain duties regarding omission liability in the following articles (It is not clear whether the following duties are taken to represent accessorial liability of omission under the F.P.C. in the jurisdiction of Dubai):

Article (223) imposes a duty on a person who takes the care of another by contract or in accordance with the law. Article (224) states that the head of a family has a duty of care regarding a child under 14 years old and that he is responsible for the child's life or health. Article (225) imposes a duty on a master in respect of a servant who is under 16 years old, namely that he must provides him with food, clothes and an accommodation. If he omits to do so and that affects the health or the life of the servant, he is responsible. Also, articles (226-227) impose a duty to intervene in relation to persons who commit dangerous acts. Presumably the above mentioned duties follow the Indian Penal Code approach regarding the liability of the principal offender in respect of omission. Surprisingly, the F.P.C. did not follow this approach. Had it done so, it would have avoided ambiguity in the scope of omission in the F.P.C.

“ The actus reus of an offence consist of criminal activity resulting from commission or omission of an act where such commission or omission is classified as a criminal offence.”

Accordingly, there are two types of omission:

1- Omission resulting from failure to act where the Penal Code requires such an act:

An example of this is article (261), which makes it an offence to abstain from taking oath or giving testimony before judicial authority. A further example is article (328) which punishes a person who abstains from delivering a child to the person who has the legal custody of the child. In this type of omission, the F.P.C. only requires a failure without any regard to any particular result.

2- ‘Pure Omission’ where the definition of an offence can be read to include an omission in its commission:

An example of this is the offence of murder and that of manslaughter. When the F.P.C. does not describe the physical element of a particular offence and the offence itself can be committed by omission or action, then it can be said that this is a ‘*pure omission*’ and sufficient for culpability,⁸⁹ if, and only if, three things are proved:

- 1- an obligation resulting from law or contract,
- 2- a causal link between the omission and the criminal result,
- 3- proof that the person could reasonably have intervened to avoid the result.⁹⁰

⁸⁹ Rabia, H., *op.cit.*, p. 178.

⁹⁰ *ibid.* pp. 179-181.

Article (31) sets out to define an offence under a general principle and accepts that a crime can be committed by an omission. However, this article was not well drafted because there are some offences which cannot be committed with omission. Examples of these are rape, assault, theft and robbery, which require an act rather than omission. Moreover, article (31) appears to deal with the liability of principal offender and no reference is made to the liability of accessories. The question then should be: is there an express provision to deal with inaction in accessorial liability?

The answer is no. The F.P.C. has allocated 8 articles (44-52) to deal with the doctrine of criminal complicity, but there is no article which expressly sets out the scope of omission in the theory of accessorial liability. Article (46) states that:

“An *accessory by causation* shall be considered as a direct accomplice (a principal), provided that he is found at the scene of an offence with intention to commit it if it is not committed by another person.”

This article somehow deals with the scope of inaction. However, there is no doubt that the aim of this article is to govern a situation where there is prior agreement to exchange roles in order to secure the commission of the offence. This may be understood from upgrading the person from mere accessory to a principal offender but the application of article (46) will not cover every case, which does not meet the requirements of previous agreement. Anything beyond this would be too wide a reading of the article and would expand accessorial liability provisions to ambiguous and tenuous situations. Also the reading of article (45) requires some contribution to the causation of the offence of the principal offender, such causal link would prevent culpability in every situation of mere presence or omission, as in the examples cited in English law where causation has no role at all.

Article (242) states that:

“ A prison term shall be imposed upon any public office holder who uses torture, force or threat, by himself or by another, against a defendant, witness or an expert, causing him to confess to a crime or to make statement or give information in respect thereof, or to suppress any such matters.”

The above article deals with situations of instigation but labels the instigator a principal offender rather than accessory. This can be understood in relation to the gravity of the offence and to the position adopted by the offender. However, this article does not address the issue of omission, as it should be, therefore, the UAE legislator should state in express provision that this offence can be committed with omission.

The F.P.C. has three articles that deal with failure from notification of crimes, articles: (272, 273, 274). Article (272) states that:

“Any public official or person in charge of detecting crimes and arresting the accused, who fails or defers to inform about a crime within his knowledge shall be punished by detention or fine.

A fine shall be imposed upon any official who is not in charge of detecting or seizing crimes, and who neglect or delays to inform the concerned authorities of a crimes within his knowledge, in the course of or in respect of his duty job.

There shall be no punishment in the above two paragraphs if the legal action of the crime requires a complaint.

Exemption from the penalty of the second paragraph may be granted if the official is a spouse of the defendant, one of his descendants, ascendants, brothers, sisters or having the same degree of relationship by marriage.”

Article (274) states that:

“A fine not exceeding 1000 Dirhams shall be imposed on whoever becomes aware of a crime and abstains from informing the concerned authorities. Exemption from the penalty may be granted if such person is a spouse of the

defendant, one of his descendants, ascendants, brothers, sisters or in laws having the same degree of relationship by marriage.”

These articles possibly suggest that a mere presence at the commission of an offence is not even a *prima-facie* evidence of accessorial liability.⁹¹ Apart from provisions already alluded to, there is nothing in the F.P.C. in relation to mere presence and omission. Thus, it is advisable to examine the matter in Arabic jurisprudence in general.

The Lebanon Court of Cassation held in 1972 that mere presence at the commission of a crime does not amount to accessorial liability unless there is proof of a previous conspiracy.⁹² However, a Lebanese commentator, M. Alojy,⁹³ rejects the requirement of conspiracy, insisting that accessorial liability can be established in cases of spontaneous involvement provided that the accessory shared a mental state with an offender. He says that mere presence must be compounded with the intention of supporting the principal in committing the offence in question. In comparison, article (80) of the Jordanian Penal Code (1951) states that:

“A person is an intervening party to felony or misdemeanour if he: c) was present at the commission of the offence with the purpose of: terrorising the opponents, strengthening the principal or to secure the commission of the offence.”

⁹¹ The usage of the articles (272-274) is too demanding when it makes it an offence to abstain from reporting every crime whether felony, misdemeanour or contravention. Logically, it should be reduced to felonies and some selected misdemeanours. Otherwise, the F.P.C. is clearly imposing a difficult general duty.

⁹² Lebanon Court of Cassation 6 /6/ 1972., cited in Alojy, M., (Part Two), *op.cit.*, p. 164.

⁹³ Alojy, M., *ibid.* pp. 164-166.

Thus, a mere spectator is not an accomplice to an illegal scene unless he has an intention to achieve one of the above underlined objectives.⁹⁴ Thus, the position of legal authorities in both Jordan and Lebanon differs from the situation in Egypt. The Egyptian Court of Cassation denies that accessorial liability can exist by omission and this covers mere presence case although the issue has not been discussed in Egyptian legal commentary.⁹⁵

It might be concluded that in the UAE, police and public prosecution authorities tend not to charge a mere spectator in such situations presumably because of the restrictive interpretation of the rule of legality or, as one might assume, because of the Egyptian law view that suggests that accessorial liability cannot exist by omission. In a mere presence case, it would be hard to prove accessorial liability requirements, namely, causation and mens rea. Moreover it is possible that public prosecution authorities would view it as being not sufficiently serious to warrant prosecution and it might use its right of not to prosecute under UAE Criminal Procedures Code No 35 of 1992, articles (7, 9, 118). These provisions state that a prosecution need not be brought where the merits brought before it is trivial, worthless, or insignificant.

Another possibility is that UAE courts could take the issue of mere presence into consideration to support the evidence against a defendant, but this should come after

⁹⁴ Al-Saeed, K., *Almbadee Alama le Amusharka Aligramia fee Qanon Alokobat Alordony*, (Arabic. *The General Provisions of Criminal Complicity in Jordan Penal Code*) (1983) Jordan: Majedlawy Publication. pp. 86-87.

⁹⁵ Egyptian Cassation Court, Case No.1906, 28 /5/ 1945, Y. 15, in Sidki, A., *Alwageez fee Alqanon Aljenai*, (Arabic. *Criminal Law*) (1986), Egypt: Dar Almarif. p. 365.

securing two main issues: causation and mens rea requirements. It could be argued that if the legislator wished to have mere presence prosecuted then this should expressly stated. An example, which demonstrates this, is article (47) of the UAE Code No. 14 of 1995 on Fighting Narcotics and Psychotropic Substances, which states:

“Whoever, is arrested in premises referred in the previous article (any place runs, prepares, or provide any narcotics or psychotropics stated in the code schedules or according to art. 41) and he knows of its purpose shall be punished by a jail term of not less than six months and not exceeding one year, and by a fine of not less than 10,000 Dirhams and not exceeding 20,000 Dirhams. If the person arrested in such places is a husband, wife, any of the ascendants or descendants of the person who runs, prepares or provides said places, he shall be punished by a jail term of six months and by a fine of not less than 5,000 Dirhams.”

One must state that the issue of omission in Arabic jurisprudence, particularly in Egypt, is plagued by uncertainty and there is conflict to whether omission has a role to play in the liability of accessories. There are two schools of thought regarding this difficult subject. The first school denies that omission has a role in establishing the physical element; a view supported by many decisions of Egyptian courts.⁹⁶ The second view, even if it lacks the judicial support, insists that there is nothing in law to exclude omission from accessorial liability.⁹⁷

⁹⁶ Mahdi, A., *Sharh Alquaed Alama le Qanon Alokobat: Dirash Muqarana bean Qanon Alemarat Alarbia Almutheda (Abu Dhabi, Dubai, wa Mashrua Alqanon Alithadi) wa Alqanon Almassri* (Arabic. *Explanation of the General Rules of the Penal Law: A Comparative Study between UAE Laws (Abu Dhabi, Dubai, and the Draft Federal Penal Code) and the Egyptian Law*) (1983), Cairo: Atlas Publication. p. 373; Obaid, R., *Mbadee Alkesm Alam menn Alqanon Alikabi*, (Arabic. *Principles of the General Part of the Penal Code*) (4th ed. 1979), Cairo: Dar Alfeker Alarabi. p. 461.

⁹⁷ Husni, M., (Arabic. *Criminal Complicity*), *op. cit.*, p.313; Al Saeed, K., *op. cit.*, pp. 93-4; Rabia, H., *op. cit.*, p.406; Alojy, M., (Part Two) *op.cit.*, p. 167; Sorror, A., *Alwaseet fee Qanon Alokobat: Alkesm Alam*, (Arabic. *Explanation of Penal Code: The General Part*) (6th ed. 1986), Egypt: Dar Alnhda Alarabia. p.174; Mustafa, M.M., *Sharh Qanon Alokobat: Alkesm Alam*, (Arabic. *Explanation of the Penal Code: The General Part*) (10th ed.1983), Cairo: Cairo University Press. pp. 347-8; Alia, S.,

The attitude of Egyptian courts tends to be that of excluding omission as a basis for accessorial liability. There are many examples of this. In one early twentieth century case, the Court of Appeal, case No. 57 for 1902, held that silence of a police officer witnessing an assault committed against an accused does not render him responsible as an accessory to the assault.⁹⁸ This view of the Appeal Court might be taken as the spur to other decisions. Indeed it was followed by the Egyptian Court of Cassation in 26 /10/ 1912, where the Court held that:

“Accessorial liability only exists in positive form and omission does not arise such liability even if the person knows of the offence and does not take steps to prevent it.”⁹⁹

Again, the Egyptian Cassation Court expressly referred to the rejecting of the application of omission in its decision No. 1906 for 1954 where it said:

“There is no doubt that accessorial liability exist only in a positive form, and never occurs in negative participation.”¹⁰⁰

There is no single justification given by neither court decisions nor the commentators who support this position. The basis of their arguments might be that 1) as a general rule, theories of criminal liability require that there should be a criminal act. Omission is an exceptional basis of liability and this is seen in many offences which does not allow omission to its application. 2) The rule of legality which requires that there be no crime or punishment except in accordance with the governing code, guides the courts when there is a doubt as to whether a particular principle applies to

Sharh Qanon Alokobat: Alkesm Alam (Arabic. *Explanation of the Penal Code: The General Part*) (1998), Beirut p. 317.

⁹⁸ Egyptian Court of Appeal Case No. 57 for 1902, cited in Rabia, H., *op. cit.*, pp. 181-182.

⁹⁹ *ibid.* p. 419.

a particular offence. The application of this rule would tend to favour a restrictive use of the omission principle, which is uncertain. Also relevant here is the argument that criminal offences should not be created by implication. 3) Since the issue of causation causes a great amount of difficulties when applied in the context of the positive act, then it causes more serious problems in relation to omission. 4) The penal codes legislation deals with complicity doctrine in many governing articles (for example the F.P.C. deals with the issue in 8 articles), which shows that the issue was well considered at the drafting stage. In spite of this, there is no declaration of one article of omission to be applied in accessorial liability.

On the other hand, some legal commentators indicate that there is a place for omission in accessorial liability, but only when it is compounded with a duty to act (a similar approach of English law). Thus, omission in the view of this school of thought is: "Abstaining from acting where there is a duty enforced by the law to act."¹⁰¹ A. Mohammed says:

"a negative form of behaviour does not become an omission recognised by the law unless it is based on a legal duty to act, and this is a general principle apply to both liabilities: principal and accessory."¹⁰²

It has been pointed out that supporters of applying omission in accessorial liability insist that before applying omission in accessorial liability cases, there must be a legal duty to act. Where do these duties come from?

¹⁰⁰ Egyptian Court of Cassation, Case No. 583 for 1945, Y. 15, cited in Sydki, *op. cit.*, p. 365.

¹⁰¹ Mohammed A., *Qanon Alokobat: Alkesm Alam*, (Arabic. *Penal Code: The General Part*) (nd.), Egypt: Dar Almatboaat Algamaia. p. 59.

¹⁰² Mohammed, A., *ibid.* p.375. Moreover it should be noted that Lebanon Court of Cassation equals between omission and active participation and this would mean that omission compounded with duty to act is part of accessories *actus reus* in Lebanon. See Alojy, M., (Part Two) *op. cit.*, p. 164.

Commentators, expressly or implicitly indicate that such legal duty is taken from civil law, particularly from the sources of obligation. An example of this in the UAE Civil Code is article (124):

“... the resources of obligations are: 1- contract 2- unilateral disposition 3- harmful action 4- beneficial action 5- law.”¹⁰³

The judicial authorities would refer to this article to see if the person who has omitted to act was under one of these obligations to act, which is stated above.¹⁰⁴

One might suggest that nothing in the reading of accessorial liability provision prevents using omission of a legal duty in accessorial liability, especially when there is no equivalent offence in the F.P.C. to punish such form of behaviour.¹⁰⁵ The use of omission liability here would serve justice; it would not easily allow an accused to escape liability, and the majority of adherents of this view states that inactive involvement is addressed under the category of assistance because the two other forms, instigation and conspiracy, must only exist in positive form.¹⁰⁶ This attitude is contrary to the view expressed in the English Draft Code that addresses inaction as inactive encouragement.

¹⁰³ Article (124) of UAE Federal Civil Code No 5 for 1985, amended by the Federal Code No 1 for 1987.

¹⁰⁴ For example, if a person agrees with a blind person to take care of him in crossing a street every day, and intentionally omits to do so while the blind man is on the road, thereby causing him an injury. He would be an accessory to that offence on the ground that he has been under contractual obligation to act. Another example is when a police officer intentionally refuse to intervene to stop an assault committed in front of him. He would be an accessory to that assault because by law he has a duty to intervene.

¹⁰⁵ It has been pointed out, the F.P.C. includes two articles (272, 274) that presumably would restrict the role of accessorial liability in omission.

¹⁰⁶ Al Shinaway, S., *Alnadaria Alama fee Algarema wal Alikab fee Qanon Alokobat Al Kuwaiti*, (Arabic. *The General Theory of Crime and Punishment in Kuwait Penal Code*) (2nd ed.1992). p. 616; Rabia, H., *op. cit.*, p.406. Cf. Mahdi, A., *op. cit.*, p. 373.

The situation in the UAE, especially in the F.P.C., regarding omission is not clear. A possible reason for this is the lack of clarity and rarity of such cases. As has been pointed out, the courts must first address the requirements of complicity: coincidence of both *actus reus* and *mens rea*. Thus, presumably the accomplices must act with an identical state of mind and there should be contribution on the accessories part to the criminal result. There would be no problem if there was an express or tacit agreement between the parties, whether it was decided before or during the offence, because it would be for the court to infer the participation. But in the case of omission compounded with duty to act, it would be difficult to use this approach for the following reason.

There is no express provision to state that a person failing to fulfil a duty is an accessory to an offence. I believe that the UAE courts would favour a restrictive approach¹⁰⁷ unless the matter brought before the court involved an offence of great gravity, such as in murder and manslaughter. Moreover, as has been pointed out, it would be true to say, although there is no supportive authority for this, that articles (272) and (274) by implication restrict the scope of inaction in accessorial liability by creating an obligation on both public officials and ordinary citizens to report an offence which comes to their knowledge. It is not fully clear whether it addresses the issue of being present at an offence or just having knowledge that a criminal offence has been or is about to be committed, but, presumably, lawyers would rely on the application of these two articles to avoid convicting a person who fails to prevent an offence either by having the power of control or being an under duty to act.

Consequently, I think that the F.P.C. should be amended to punish whoever intentionally fails a duty to act as an accessory to an offence if it is committed in accordance with such an omission.¹⁰⁸

¹⁰⁷ Cf. Rabia, H., *op. cit.*, p.182.

¹⁰⁸ One might suggest that there should be an express article to indicate the duties, which in respect of liability for omission may arise. However, this would be an impossible task for legislation. Thus, duties should be inferred from the F.P.C., the domestic penal codes and from article (124) of the UAE Civil Code.

Chapter 3

The mens rea requirements for accessory liability

Chapter 3

The mens rea requirements for accessorial liability

The necessary elements of a crime are normally considered to be an actus reus and mens rea. However, under English law there are many crimes requiring no personal fault, these being strict liability offences. The general requirements of a criminal mens rea, reflects the idea that a person should not be convicted unless it can be proved that he intended to cause the harm, or that he knowingly risked the occurrence of the harm. The emphasis of these requirements has been upon the defendant's personal awareness of what was being done or omitted, although some judicial decisions have created exceptions to this. The doctrine of criminal complicity extends this principle to accessories to a crime, who must also fulfil the mens rea criterion for criminal responsibility. In addition, how can a person become guilty of a criminal offence? The importance of such analysis comes from the notion that one of the main functions of criminal law is to express the degree of wrongdoing. Mens rea in this respect is a mechanism of criminal liability; it is the morale element in an offence, which represents the accused's state of mind when he commits an offence. Another reason for such analysis is found in the maxim: *actus non facit reum, nisi mens sit rea* – an act does not make a person legally guilty unless the mind is legally blameworthy. This leads us to investigate the operation of this term in the criminal law system of both England and the UAE.

The aim of this chapter is to discuss the issue of mens rea in the context of criminal complicity. I shall examine English cases to see how they treat the subject of mens rea, and to elaborate the circumstances that make a person a secondary party. I shall then examine the debate as to intention against 'knowledge or recklessness' to decide the mental element of secondary participation. In addition, I shall examine how English law treats the issue of the principal offence's future crime. Finally, a view is expressed as to what approach English law should follow in this area. An evaluation of the doctrine of mens rea of accessorial liability under Arabic jurisprudence will be undertaken to see how the issue is settled in that legal tradition and also to point out the status of the concept under the F.P.C. Accordingly, some important questions shall be asked including: Is the F.P.C. in this area intelligible to the layman? Should the F.P.C. be interpreted in the light of other sources, such as legal commentary? What approach should the F.P.C. take to mens rea in respect of accessorial liability.

English Law

(A) General requirements of mens rea

Mens rea is the state of mind which must accompany the actus reus in order for an offence to be committed. This concept signifies that an act is not criminal unless the mind is guilty. In relation to this mental requirement, crimes are divided into two categories: crimes of specific intention and crimes of basic intention.

a) **Specific Intention:**¹ For the most serious crimes such as murder, theft, obtaining property by deception and wounding with intent, what is required is a direct or oblique intent to cause a criminal result; this is also required where the definition of the offence calls for a further intent as to a particular thing, 'ulterior intention.' An example of the first is murder and attempted murder; in respect of these offences, the accused must have an intention to kill or to cause grievous bodily harm. Theft is an example for the second, where the required mens rea is the obtaining of the thing dishonestly and with an intention of permanently depriving another person of his property.²

At this stage, the question is, what does intention means? Direct intention means: 'a decision to bring about, in so far as it lies within the accused's power.'³ This is to say the intention is direct when the accused's main aim is to achieve the result; he desires its occurrence, which suggests that the result is his purpose. However, when the accused wants a particular thing to occur but realises that another thing virtually certainly will occur, although it may not be desired, there should be a form of intention. A well-known example is where D places a bomb in a plane to damage the cargo while the plane is in the air. Here he has foresight of the fact that it is virtually certain that this will cause loss of life. This is an oblique intention on D's part, but he may still be charged with murder. However, oblique intent is not intention in itself,

¹ Intention is not defined by any statute and its meaning is taken from case law. However, there is doubt that case law has clarified the meaning. See: Williams, G., *Textbook of Criminal Law* (2nd ed. 1983), London: Stevens and Sons. p. 51; Card, R., *Card, Cross and Jones Criminal Law* (13th ed. 1995), London: Butterworths. pp. 62-63.

² Section 1 (1) of Theft and Related Offences (1968).

³ *Hyam v. D.P.P.* [1974] 2 All ER 41 at 52; *Mohan* [1975] 2 All ER 193 at 200. Cf. *Steane* [1947] K.B. 997; [1947] All ER 818.

but it is an evidence of intention and it is for the jury to decide whether there has actually been intention).⁴ Although this type of mens rea was designated to murder it was assumed that it covered other crimes of specific intention.⁵ By contrast, the English Draft Criminal Code of 1989 in defining intention, in cl. 18, indicates:

“A person acts...b) intentionally with respect to ‘i’ a circumstance when he hopes or known that it exists or will exist; ‘ii’ a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events;”⁶

Thus, intention under the Draft Code is direct intention which is purpose, and oblique intent, as a separate type of intention, established when a defendant is aware that the offence will occur in the ‘ordinary course of events’ (a term used by the drafters to denotes knowledge of virtual certainty as mentioned). Possibly the only distinction is that the Draft Code proposed that oblique intention (knowledge of virtual certainty)

⁴ See, for this meaning, the following decisions of the crime of murder: In *Moloney* (1985) AC 905, the House of Lords held that judges should not define intention beyond the term purpose. Exceptionally the jury should be directed to decide whether the defendant contemplated the prohibited result as a natural consequence in order to infer intention from his action. The case established that foresight of a consequence might be an evidence of intention but the problem was that the term ‘natural consequence’ was left undefined and that caused concerns that it might combine recklessness with criminal intention. However, the House of Lords in *Hancock and Shankland* (1986) AC 455, overruled the above decision, in relation to test of ‘natural consequence’, stressing that when considering the evidence of intent, the greater the probability of a consequence, the more likely that it was foreseen and therefore intended. Again the House of Lords did not solve the dilemma of the meaning of oblique intention and how the jury should be directed. In *Nedrick* (1986) 3 All ER. 1; [1986] 83 Cr. App. Rep. 267, the Court of Appeal stated that ‘a result is intended: a) when it is the actor’s purpose, b) a court or jury may also infer that a result is intended, though not desired when 1) the result is a virtually certain consequence of that act and 2) the actor knows that it is a virtually certain consequence’. R. Card suggest, that according to the above decisions, in certain crimes an inference of intention may not be drawn, when the offence require specific purpose such as offences under s. 1 of the Official Secrets Act 1911 ‘entering a prohibit area with intent to prejudicial to the safety or the interest of the State’ and also in blackmail. Card, R., *Criminal Law* (1995), *op. cit.*, pp. 68-69. This suggest that leading law commentators believed that oblique intention, as stated by the above cases of murder, is applied to most crimes. However, as I shall examine below, the House of Lords in *Woollin* decided otherwise by restricting the above type of oblique intention to the crime of murder.

⁵ Interpretation of *Moloney* and *Nedrick* by Smith J.C., *Smith and Hogan Criminal Law*, (18th ed. 1996), London: Butterworths. p. 63, and the drafters of the Law Commission Report No. 177, *Criminal Law: A Criminal Code For England And Wales* (1989). Vol. 2 pp. 192-3; Card, R., *Criminal Law* (1995), *op. cit.*, pp. 68-69.

⁶ cl. 18, Draft Criminal Code 1989, Vol. 1 p. 51.

should be a class on its own rather than being an evidence of intention.⁷ However, in 1998 the House of Lords in *Woollin*, although approving the decisions of *Hancock and Shankland* and *Nedrick*, declared that the notion of oblique intent, as said by the above cases, is only relevant to the crime of murder which means that this type of oblique intent is not a form of intention in other intentional crimes.⁸

b) Basic intention:⁹ A crime of basic intention is one in which the mens rea can be located either in intention or recklessness. In such cases, the prosecution's task of proving the accused's mental state is easier than in cases where specific intention is required. Examples of these crimes are unlawful wounding, common assault, criminal damages and, rape.

The concept of recklessness¹⁰ is divided into two categories: subjective and objective; both mould the notion of taking unjustified risk.¹¹ The higher level is subjective, which occurs when a person realises risk that a certain consequence may possibly result from his action but he still carries on with his action. The lower level

⁷ The team of the Draft Criminal Code 1989 stressed that "a person awareness of any degree of probability (short of virtual certainty) that a particular result will follow from his acts ought not, we believe, to be classed as 'intention' to cause that result for criminal law purposes...Liability based on the awareness of a probable result can be provided for by casting the offence in terms of recklessness." Vol. 2 pp. 192-3.

⁸ *R v. Woollin* [1999] AC 92; [1998] 4 All ER 103. The House of Lords approved the decisions of *Hancock*, *Shankland*, and *Nedrick* in relation to oblique intention adding that the jury are entitled to find rather than infer intention from foresight of virtual certainty. Lord Steyn *Woollin* [1998] 4 All ER 103 at 107-108. Wilson, W., "Doctrinal Rationality after *Woollin*" [1999] 62 *Modern Law Review* 448 at 462; Ashworth, A., *PCL* (1999), *op. cit.*, pp. 180, 182, 269; Childs, P., *Nutcases: Criminal Law* (2nd ed. 1999), London: Sweet & Maxwell, p. 17.

⁹ See the judgement of Lord Simon in *D.P.P. v. Morgan* [1975] 2 All ER 347 at 363.

¹⁰ The English Draft Criminal Code defines recklessness in cl. 18, (c) as: "A person acts... b) 'recklessly' with respect to: (i) a circumstance, when he is aware of a risk that it exists or will exist, and (ii) a result when he aware of a risk that it will occur; and it is in the circumstance known to him, unreasonable to take the risk..." See Smith, J.C., *Criminal Law* (1996), *op. cit.*, p. 72.

¹¹ Card, R., *Criminal Law* (1995), *op. cit.*, p. 71.

is objective, which occurs when a person fails to think about the possibilities of there being a risk. However, he may be convicted if a reasonable man would have foreseen that there was a risk in the circumstances.

c) Cunningham Recklessness: this subjective standard of liability operates in most recklessness offences. The standard of subjective culpability was set out in *R v. Cunningham* (1957).¹² In this case, the defendant broke a gas meter to steal the money it contained, and the gas escaped into the house next door and endangered life. The charge was framed under s. 23 of the Offences Against The Persons Act for 1861 ‘maliciously administering a noxious thing so as to endanger life.’ The accused’s conviction was quashed because of a misdirection by the trial judge as to the meaning of the word ‘maliciously’, the court saying that it meant intentionally or recklessly, which was not the accused’s state of mind during the commission of the offence. In order to be convicted, the accused must contemplate that a particular result might occur and nevertheless take the risk.

d) Caldwell Recklessness: this objective test, which is easier to prove, is derived from *R v. Caldwell* (1982).¹³ Here the accused started a fire at his ex-employer’s hotel, thereby causing some damage. He was charged with criminal damage according to the Criminal Damage Act, an offence that requires basic intention. The House of Lords held that the accused was careless as to whether he damaged the property if he created a risk of damage which would have been obvious

¹² *Cunningham* [1957] 2 Q.B. 396; [1957] 2 All ER 412; [1957] 41 Cr. App. Rep. 155.

¹³ *Caldwell* [1982] AC 341; [1981] 1 All ER 961; *Lawrence* [1982] 2 AC 510, [1981] 1 All ER 974.

to an ordinary person, and either did not give any thought to the possibilities of any such risk when he carried out his action, or he did recognise that there was a risk and nonetheless he took it.

In fact, failing to see any risk involved in an action should not constitute the basis of liability because the phrase *mens rea* refers to the state of mind expressly or implicitly required by the definition of the offence.¹⁴ However, the authority of *Caldwell* created a new concept in English criminal law which was more open than the *Cunningham* test. The major element in this objective test is that the accused need not have seen that there is a risk which could possibly occur; it is enough that the risk was obvious to a reasonable man. The place for this test is in offences such as dangerous driving or criminal damage.¹⁵ This standard of liability gives rise some difficulties, such as to which type of recklessness to apply in basic intention offences. It is also a narrowing of the concept of recklessness to negligence. The latter is a tort law concept adopted by the criminal law to cover the presumed *mens rea* of some offences, where the accused breaches a duty of care he owes when performing an action which a reasonable man would not do. This applies particularly in motoring offences; the only common law crime which applies gross negligence is manslaughter.¹⁶

¹⁴ *Caldwell* type was applied by the House of Lords in involuntary manslaughter in *Seymour* [1983] 2 AC 493, [1983] 2 All ER 1058. The Court in this case suggested that this objective test should be applied on all other offences of recklessness. However, the decision was overruled in 1994 by the House of Lords in *Adomako* [1994] 3 All ER 79.

¹⁵ It is not exactly clear which other offences that apply this objective test. See Elliot, C & Quinn, F., *Criminal Law* (3rd ed. 2000), Longman. pp. 14-21.

¹⁶ McCall Smith, R.A. & Sheldon, D., *Scots Criminal Law* (1992), Edinburgh: Butterworths. pp. 39-40. The terminology used by the F.P.C. dealing with the concept of fault covers the three: *Cunningham*, *Caldwell* and negligence. It would be odd and incoherent if adopted in the *mens rea* requirements of accessorial liability. I shall discuss later that this remains a possibility in the UAE. At

(B) The required mens rea for accessorial liability:

What is the required mens rea?

Many questions arise in this connection and all are directed to one single idea, namely how strong is the accessorial mens rea regarding the commission of the principal offence? Thus, it might be asked: does English law require a coincidence of state of mind between accomplices? In other words, must accessories act like perpetrators with a similar state of mind in relation to the offence? Others can understand the question as: does English law require higher degree of mens rea in relation to accessories as in the case of intention? This issue has important implications because the issue of mens rea is the vital element in deciding the boundaries of accessorial liability.

There are conflicting arguments; some say that there must be a purpose to participate. Others give purposes a wider meaning, and a third group supports the idea that complicity by encouragement requires purpose whereas complicity by assistance requires only knowledge.¹⁷ This is one of the grey areas of the law of

this stage, it is necessary to mention that English law contains some crimes that can be committed without a mens rea based on 'the doctrine of absolute liability'. This concept is an exception to the principle: '*actus non facit reum, nisi mens sit rea*' which means the act is not criminal unless the mind is guilty, a form of responsibility that Arabic jurisprudence does not adopt especially in the UAE. The mens rea in the F.P.C. is always either intention or fault but there is no absolute liability. In strict liability offences the accused's guilt is based on the commission of the actus reus alone; there is no need to prove a guilty mind and even if the accused has taken every care to avoid committing the offence, he is still held responsible.

¹⁷ Debate about this matter between Sullivan, G.R., "Intent, Purpose and Complicity" [1988] *Crim. LR* 641, [1989] *Crim. LR* 166, where he thinks that intention in complicity has a wider sense and does not relate to purpose; and Dennis, I.H., "Intention and Complicity: a reply" [1988] *Crim. LR* 649, [1989]

criminal complicity, as it appears that there is uncertainty regarding the issue of mens rea; case law and commentators differ on this point.

Accessory liability is subjective in nature, that is to say, an accessory must contemplate the carrying out by a perpetrator of the offence. When the accessory does not contemplate commission of the offence, even where an ordinary person would contemplate this, then, there is no liability for complicity. As the general run of cases and academic commentators shows, accessory liability involves three notions: intention, indifference, and knowledge.

The general run of complicity cases and some commentators indicate that accessories must have acted intentionally. However, these tend not to discuss what is meant by intention. Does the case law then assume a general concept of criminal intention? Has intention in complicity a special meaning? There is no clear answer to this, and it is therefore necessary to examine the meaning of intention as it is applied elsewhere in criminal law.¹⁸

Intention is regarded as the most culpable state of mind in the criminal law, and indeed some serious crimes can only be committed intentionally. One might think that this fundamental issue of liability would have been settled a long time ago but

Crim. LR 168, where he argues in favour of purpose in both complicity by influence or encouragement and by assistance; also see Duff, R. A., "Can I help you? Accessorial liability and the Intention to Assist" (1990) 10 *Legal Studies* 165; Williams, G., "Complicity, Purpose and the Draft Code" [1990] *Crim. LR* 4 and 98, where he argues in favour of purpose in encouragement and a modified foresight in assistance.

¹⁸ Cf. *R v. Powell*; *R v. English and Others* [1998] 1 Cr. App. Rep. 261; [1997] 4 All ER 545. The House of Lords strangely decided that the general concept of criminal intention as it is found in the

this is not the case. That is to say, there is still uncertainty regarding some aspects of intention in criminal law. The core meaning of intention is purpose,¹⁹ which is the reason a person has for his action.

It appears that purpose is the major element which distinguishes intention from subjective recklessness, because both tests of liability share the subjective standard of blameworthiness. In other words, in both areas the accused must contemplate the criminal result, which may result from his action. For example, A and B, on two different occasions commit the same action (driving at high speed along a city street) and cause the death of two persons. The court, however, convicts A of manslaughter and B of murder. In this example the two accused have deliberately performed acts, but only one of them B has done it with a state of mind which amounts to more than the mere contemplation of the result. What is the basis of the distinction between these two cases? It is likely to be purpose. The court in this hypothetical example might find that B had threatened the victim with death or that he wanted his death for some reason. That is to say, he acted purposely, whereas A did not have purpose to kill.

Some would argue that intention does not relate to purpose, that it relates to reasons for acting. (A person may do thing for no reason, such as dropping an object with no purpose). A person may act intentionally for several reasons. For example A may kill

leading cases such as *Hancock*; and *Nedrick* do not govern the issue of mens rea in accessorial liability. See chapter 4, pp. 235-243.

¹⁹ Smith, J.C *Criminal Law* (1996), *op. cit.*, p.57; Ashworth, A., "Criminal Liability in a Medical Context: the Treatment of Good Intentions", in Simester, A. and Smith, A.T.H., (eds.) *Harm and Culpability* (1996), Oxford: Oxford University Press. p. 179.

his mother, not because he wants the death of his mother in itself, but because he wants to inherit from her as quickly as possible. Should the killing itself amount to purpose? It might be explanations for such action, but the criminal law is interested in only one reason for that action. This reason is stated in the definition of the offence; in the previous example the killing is the purpose because the task is not to ask with what intention or reason the accused commits the action but whether one particular legally relevant intention is present when the act is committed.

In *R v. Walker* (1989), a case of attempted murder, the Court of Appeal deals with the issue directly when it says:

“Trying to kill was synonymous of purpose, and it had never been suggested that a man did not intend what he was trying to achieve.”²⁰

The difficulty in this case only arose where he brought about a result, which he was not trying to achieve. It appears that this judicial opinion follows the same line as does the judgement of *Mohan* (1976), which indicates that the core of the concept of intention is purpose.²¹ However, in some situations purpose cannot be proved and the amount of thought directed by the accused to the result is very high. For example, a person acts with purpose to do X, foreseeing that it is virtually certain that a side effect Y will result. Is Y intended? The narrow sense of purpose that implies a choice to bring an end to the action or as means to that end does not cover such a situation or those actions that are wanted for themselves. For example, A wants to collect the insurance taken out in respect of his property carried by an airline from London to Boston. He times a bomb to explode while the plane is over the ocean, knowing that

it is virtually certain to kill the passengers. Should this amount to intention? Or should it be regarded as recklessness? Commentators in this area are divided. For example, Anthony Duff says:

“The persisting confusion over whether intention should in law encompass an action’s morally certain side-effects reflects a failure to distinguish these two aspects of intention. The concept of intention both does and does not encompass such side effect: it does, in that they are brought about intentionally; it does not, in that the agent does not act with the intention of bringing them about.”²²

He does not consider side effects to be the same as intention, but he agrees that the degree of foresight brings it more close to the concept of intention rather than recklessness. Glanville Williams doubts this view and suggests that it confuse the ordinary meaning of intention.²³ He adopts purpose and foresight of the result being virtually certain as intention. Both views agree that when the accused contemplates certain harm as being more likely to happen, this contemplation points more to intention than recklessness.

The courts’ attitude to the adoption of a narrow or border concept of intention varies. Cases like *Steane* (1947),²⁴ and *Gillick* (1986)²⁵ consider intention in the context of purpose and cases such as *Smith* (1960)²⁶ and *Chandler* (1964)²⁷ accept the wider

²⁰ *Walker* [1989] 90 Cr. App. Rep. 226; (1990) *Crim. LR* 44.

²¹ *Mohan* [1976] Q.B. 1.

²² Duff, R. A., *Intention, Agency and Criminal Liability* (1990), Oxford: Blackwell. p. 80.

²³ Williams, G., “Oblique Intent” [1987] *Cambridge Law Journal* p. 417.

²⁴ *Steane* [1947] K.B. 997.

²⁵ *Gillick* [1986] AC 112.

²⁶ *Smith* [1960] 2 Q.B. 423.

²⁷ *Chandler* [1964] 1 AC 763.

concept. In *Hyam v. Director of Public Prosecutions* (1975)²⁸ the House of Lords said that foresight of high probability of grievous bodily harm (GBH) satisfies the mens rea of murder. However, in *Moloney* (1985)²⁹ the House of Lords abandoned the test introduced in *Hyam*, and required a higher degree of contemplation than in *Hyam*. The authorities of *Moloney*, *Hancock and Shankland* (1986) and the Court of Appeal in *R v. Nedrick* (1986) indicate that intention in criminal law will normally require purpose or a court or jury may infer intention without doubt when the result virtually is certain consequence of the act and the accused knows that. The courts emphasise that knowledge here is only evidence of intention and it is not intention in itself.³⁰

It is true that one cannot enter into the accused's mind at the time he commits the crime; it is required to find his intention from the surrounding circumstances. However, what is meant by the statement that a result is certain to follow? There is an argument that someone who accepts a risk of death amounting to virtual certainty comes very close to a person who chooses the victim's death as a means to an end. One might argue that there is no doubt that the bomb will kill, the only doubt is as to how many will be killed. However, the meaning of the term *virtual certainty* is open to debate. Let us suppose that in the bomb example, the bomber times the bomb to

²⁸ *Hyam v. D.P.P.* [1975] AC 55. The degree of foresight brings intention close to recklessness because there is still a doubt in the accused's mind of the result occurrence, see Ashworth, A., *PCL op. cit.*, pp. 174 - 175.

²⁹ *Moloney* [1985] 1 All ER 905.

³⁰ *Supra.* footnotes 4, 5, and 8. This test can be used, by reference to English case law, to decide the required mens rea of accessorial liability. However, the House of Lords recently narrowed such suggestion by declaring in *Powell; English* (1997) that the above decisions of *Hancock and Shankland* and *Nedrick*, on oblique intention, are not applied in accessorial liability, and finally in *Woollin* (1998) by declaring that oblique intention, as in the above two cases, is only applied in deciding the required mens rea for the crime of murder.

explode before the plane takes off or designs the bomb itself in such a way as to cause minor damage only. Does he contemplate the result as certain to happen? Alternatively, let us imagine that he places the bomb on a military plane, knowing that every one will use a parachute to escape death. Would it be true to say that the bomber still contemplates the death as being virtually certain to happen?

If we apply to these examples the test applied in *Hyam*, namely that of the contemplation of probabilities, then the placing of the bomb may be regarded as amounting to an intention to kill. Under *Hancock and Shankland* and *Nedrick*, however, the test is different and one has to ask: was the occurrence of death a virtual certainty? But how can the court or jury measure the degree of certainty? This is a difficult question with no clear answer. If the jury asks the judge for directions, what kind of explanation might he give to assist the jury's inquiry into intention?³¹

Scottish criminal law try to avoid the problem of oblique intention by introducing the term *wicked recklessness* as an alternative and sufficient mens rea for murder.³² This term distinguishes extreme recklessness from simple recklessness. In other words,

³¹ Note that the term used is 'virtually' which means: almost; very nearly, and this is easier to be estimated than 'absolute certainty' from the evidence of each case. Longman Dictionary of Contemporary English (1992), England: Longman. p. 1175. By contrast, s.8 of the Criminal Justice Act 1967 indicates that it is not bound in law to infer intention from foreseeing a result of being a natural and probable consequence of the accused's action but reference should be made to all evidence. This provision confirms the subjective nature of intention, and overrules the judgement of *Smith* (1960) which ruled that in order to prove intention by the jury, inference should be based on the test of reasonable man with no need to prove that the accused foresaw the result

³² See Gordon. G., *Criminal Law of Scotland* (2nd ed. 1978) Edinburgh. pp. 736-41; Jones, T.H. & Christie, M.G.A., *Criminal Law* (2nd ed. 1996), Edinburgh: W. Green/Sweet & Maxwell. pp. 209-213.

the distinction gives more weight to the gravity of the accused's conduct and equiparates unintentional killing with intentional killing.³³

As has been pointed out, the term *intention* (dealing with accessorial liability) has not been defined in previous cases, and this leaves an element of doubt around this central concept of criminal liability, and does not satisfy the requirement of certainty in defining essential issues of liability. A requirement of purpose in complicity would suggest that the accessory wants the crime to be committed. In the example of murder as a crime of intention, when both the perpetrator and the accessory perform their acts, they act in concert; there is unity both in their aim and in the result they want to occur. The victim's death is their final goal; each will act towards it and this mental state is what links them. They want the death of the victim and do their best that it should be brought about.

Since accessorial liability depends on the perpetrator's liability, and because in English law there is no need to prove a casual link between the accessory's action and the result of the perpetrator's action, should this indicate that the accessory must act purposefully? In other words, should he share the same state of mind as the accused?

Some complicity cases suggest that there must be purpose on the accessory's part. An example of this is *Fretwell* (1862) a nineteenth-century case.³⁴ The defendant's pregnant friend had threatened to commit suicide unless he brought her an

³³ Ashworth, *PCL* (1995), *op. cit.*, pp. 262-263.

abortifacient. He unwillingly supplied this and hoped that she would not use it. Unfortunately, the substance killed her while she was using it and the accused was charged with being an accessory to common law self-murder. It was held, however, that the accused was not liable for this offence because he was unwilling that the woman should take the substance.³⁵ This case has been portrayed as making a distinction between indifference and unwillingness, but there is uncertainty as to whether the case actually did this.³⁶ However, it appears that intention here has a narrow meaning, which is that of purpose. That is to say, the accused did not have a purpose to kill. This would lead us to conclude that there is a requirement that an accomplice should act with a similar state of mind to that of the principal offender.

In *Gillick v. West Norfolk and Wisbech Area Health Authority* (1985), (a civil case), the House of Lords held that a doctor who gives advice to a girl under 16 in her best interests, while realising that this might facilitate acts of unlawful sexual intercourse, should not be guilty of offence under Section 6 of the Sexual Offences Act 1956 of aiding and abetting a girl under 16 to commit unlawful sexual intercourse.³⁷

Lord Scarman said:

“The adjective “clinical” emphasises that it must be a medical judgement based on what he [the doctor] believes to be necessary for the physical, mental and emotional health of his patient. The bona fide exercise by a doctor of his clinical judgement must be a complete negation of the guilty mind

³⁴ *Fretwell* [1862] Le & Ca 161.

³⁵ *ibid.* In *Gamble* (1959) Devlin J cited *Fretwell* without disapproval for the proposition that ‘proof that the article was knowingly supplied is not conclusive evidence of intent to aid.’ See Dennis I.H., “The Mental Element for Accessories” in Smith, P., (ed.), *Criminal Law: Essays in Honour of J.C. Smith* (1987), London: Butterworths. p. 40 at p. 52. Should this suggest the requirement of assent or approval from the accessory to the commission of the principal offence?

³⁶ Smith, J.C., *Criminal Law* (1996), *op. cit.*, p. 139.

³⁷ *Gillick* [1986] AC 112; [1985] 3 All ER 402.

which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse.”³⁸

It is clear from this that the Court excluded the doctor from criminal liability because he did not have an intention to aid and abet even though his prescribing advice could be foreseen as virtually certain to assist the commission of an offence.³⁹ It was not his purpose to influence or assist the unlawful intercourse. This case appears to adopt a narrow meaning of intention, as does *Fretwell*.⁴⁰ On one view, the case law suggests that intention in complicity refers to purpose, but other cases point in the opposite direction. *Fretwell* and *Gillick*, both take the same line as the UAE approach, which requires that often there should be a similar state of mind shared by accomplices. However, does this indicate that English law and UAE law are in overall harmony in this area?

In R v. Clarke (1984),⁴¹ the accused aided and abetted a burglary with the intention of assisting the police by passing to them information about the other parties and thus enabling the stolen goods to be regained. However, he was charged as an accessory to the crime, and the trial judge directed the jury to convict the accused of voluntary participation on the basis of his knowledge of the circumstances of the offence. On

³⁸ Smith, J.C. & Hogan, B., *Smith & Hogan Criminal Law Cases and Materials*, (6th ed. 1996) London: Butterworths. pp. 306-307. Only Lord Brandon thought that contraceptive advice is always unlawful because it encourages the offence; this view takes the same line of *Gamble*, unless there is a defence which has not been mentioned in the express judgements.

³⁹ Ashworth, A., *PLC* (1995), *op. cit.*, p. 173.

⁴⁰ See for the same meaning in Smith, K.J., *A Modern Treatise on the Law of Criminal Complicity* (1991), Oxford: Oxford University Press. p. 148 at note 31; Smith J.C., *Criminal Law* (1986), *op. cit.*, pp. 60, 137, 253, where he considers *Gillick*'s effects as a defence of necessity. However, the above statement of Lord Scarman is an objection to such a defence. See Smith K., *MTLCC op. cit.*, p. 148 at note 35; and also Williams G., “Complicity, Purpose and the Draft Code” *op. cit.*, p. 15.

⁴¹ *R v. Clarke* [1984] 80 Cr. App. Rep. 344; [1985] *Crim. LR* 209; *R v. Anderson* [1986] AC 27.

appeal, it was held that the defence should have been left to the jury to decide.⁴² Unlike the previous cases, this case suggests that accessories can be found guilty even when they do not share the perpetrator's state of mind.

The first English case to discuss the *mens rea* problem in this area was *N.C.B. v. Gamble* (1959),⁴³ a turning point in the law of complicity. The offender M, a lorry driver, took his lorry to the National Coal Board premises, where it was filled with coal. He then drove to the weightbridge. The operator H weighed the lorry and told M that the load was excessive. M said that he would take the risk and took the weightbridge ticket from H. and left. He was stopped by the police on the road and was charged as a principal in the offence under the Motor Vehicles (Construction and Use) Regulations 1955. The NCB was convicted under the vicarious liability principle as an accessory to the principal's offence committed by their employee H.

This case suggests that complicity does not require anything beyond mere indifference, even if the court actually used the term intention to describe the accomplices' state of mind. The employee may not have intended to help M to commit the offence. Only after he had committed his action of assistance, he was aware of the risk that was involved in that action. Not surprisingly, this case has given broader meaning to the *mens rea* requirement and has been described as ambiguous and conflicting case.

⁴² Dennis I.H., "The Mental Element for Accessories" *op. cit.*, p.53.

⁴³ *National Coal Board v. Gamble* [1959] 1 Q.B.11.

The most significant principle stated in *Gamble* for our current examination is that the accessory does not have to share the perpetrator's purpose as to the result; Devlin J said:

“An indifference to the result of the crime does not itself negative abetting; if one man deliberately sells to another a gun to be used for murdering a third; he may be indifferent about whether the third lives or dies and interested only in the cash profit to be made out of the sale, but he can be still an aider and abettor.”⁴⁴

At this early stage it should be noted that under accessorial liability applied in the UAE, it might be true to say that the hypothetical example of the seller in *Gamble* is outside the scope of the complicity provisions, where often there must be sharing of purpose to the criminal result that both are needing its occurrence. English law in this respect has a much wider notion of mens rea and the accessory does not have a purpose to the result. However, a later view expressed in the case of *Gamble* in the same judgement complicated the situation:

“to hold otherwise [i.e., that the mens rea require purpose] would be to negative the rule that mens rea is a matter of intent only and does not depend on desire or motive.”⁴⁵

Moreover, the judge also said:

“Proof that the article was knowingly supplied is not conclusive evidence of intent to aid. But *prima facie*... a man is presumed to intend the natural and probable consequences of his acts...and it is always open to the defendant ...to give evidence of his real intention, but in this case the defendant called no evidence.”⁴⁶

⁴⁴ *Gamble* [1959] 1 Q.B. 11 at 23.

⁴⁵ *ibid.* p. 23.

⁴⁶ *ibid.* p. 20.

Strangely, these later views of Devlin J requiring intention never appeared in the hypothetical example of the gun seller. One commentator⁴⁷ points out that what Devlin J may have meant by intention is an act that is done voluntarily, although this interpretation is undermined by the requirement of proof of the real intention, and it seems that unwillingness or a lack of desire for the perpetrator's offence negates mens rea. This conflicts, however, with the hypothetical example of the gun seller, which follows the opposite view.

Another leading commentator has questioned the judicial approach in *Gamble* to intention in complicity, Glanville Williams states that the term intention means more than knowledge: could it mean the accessory's own purpose? How can the accessory escape conviction? What kind of evidence must he put before the court? Why is it upon the accessory, not the prosecution, to prove the real intention?⁴⁸ These are the weakest points in *Gamble* that are not answered by the decision, although it has been taken as authority for the proposition that motive is immaterial to complicity.⁴⁹ One major point in *Gamble* is that accessories do not need to share the main actor's mens rea; indifference to the criminal result is enough. Furthermore, it departs from previous judgements, which implicitly require some connection between the minds of accomplices, which implies intention.

⁴⁷ Smith, K., *MTLCC*, *op. cit.*, p. 144.

⁴⁸ Williams, G., *TBCL op. cit.*, p.342; "Complicity, Purpose and the Draft Code" *op. cit.*, *op. cit.*, pp. 15- 16.

⁴⁹ Smith, K., *MTLCC*, *op. cit.*, p. 145.

Another case, which takes a similar line to the judgement in *Gamble*, is *D.P.P. for Northern Ireland v. Lynch* (1975).⁵⁰ The Court of Criminal Appeal dismissed an appeal against conviction of murder as an aider and abettor. The accused, L, argued that he had a defence of duress when he was ordered by a gunman to drive him and others to a place where they intended to kill a policeman. The gunman was known to be extremely violent and said to L that it would be dangerous to disobey him. L believed that he would be killed if he refused to drive them, which he did, remaining in the car until they finished the task and then driving them away. It was held in this case that a person who knows of another's criminal purpose and voluntarily aids him in it can be held to have aided that offence even if he had regretted the plan or was horrified by it, he is still aider and abettor.⁵¹ *Lynch* has been taken to indicate that knowledge is sufficient for conviction of complicity.

The conflicting authorities of *Gamble* and *Gillick* have divided opinion as to the ground of mens rea in complicity,⁵² whereas in *Gamble*, apart from Lord Devlin's commentary on intention, it seems that knowledge of what the perpetrator is about to do is sufficient. However, in *Gillick*, the majority of the House of Lords accepted a narrow interpretation of the word purpose.

In *Blakely and Sutton v. Chief Constable of West Mercia* (1991),⁵³ D1 and D2 had laced B's soft drink with vodka intending him to stay the night with D1 instead of

⁵⁰ *Lynch* [1975] AC 653, [1975] 1 All ER 913.

⁵¹ *ibid.*

⁵² See the three-way debate of Sullivan, Dennis, and Williams in *Crim. LR.* 1988; 1989; 1990 *op. cit.*, at footnote 17.

⁵³ *Blakely & Sutton* [1991] RTP 405; [1991] *Crim. LR.* 763.

going home to his wife. Both of them intended to tell him about the drink before he left, but B left before they could do so. B was convicted of driving with excess alcohol in his blood. D1 and D2 were charged with procuring B's offence but their convictions were quashed. The Divisional Court said that it is sufficient for other forms of complicity, but not for procuring, that the defendant contemplated his act *would or might* bring about or assist the commission of the perpetrator's offence.

As has been seen, the main requirement of *Cunningham* recklessness is subjective. This could be a turning point in the law of criminal complicity,⁵⁴ which rejects the suggestion made by some commentators that mere recklessness is not enough and there must be intention.⁵⁵ If *Blakely and Sutton* following the decision of *Gamble* is widely applied, it embraces the conduct of those who act without sharing the main perpetrator's purpose, and would be bringing 'innocent activities' within the net of criminal complicity. Can it be said after all that the issue of mens rea regarding accessorial liability is settled? In other words, what term constitutes the minimum requirement of mens rea in accessorial liability? This question will be addressed below.

⁵⁴ Ashworth, A., *PCL* (1995), *op. cit.*, p.424; Card, *Criminal Law* (1995) *op. cit.*, p. 558.

⁵⁵ Smith, J.C., *Criminal Law* (1996), *op. cit.* p.138; Williams, G., *TBCL op. cit.*, p. 336.. The English Law Commission suggests that subjective recklessness is insufficient and that actual knowledge is required. This was suggested to not bring those who act in ordinary course of business within the net of criminal complicity. See: Law Commission Working Paper No. 43, *Parties, Complicity and Liability for the Act of Another* (1972). p. 49. By comparison, negligence is inadequate to be applied in the mens rea of accessorial liability. An example is provided by *Callow v. Tillstone* [1900] 83 LT 411. D1 was a veterinary surgeon who had examined a carcass and negligently certified it as sound to D2. D2 was charged with selling unfit food, a strict liability offence. D1's liability as accessory to that offence was quashed because mere negligence is not a sufficient mens rea for accessorial liability.

Intention v. 'Knowledge or Recklessness':

Essentially, the English theory of criminal complicity holds that accessorial liability only requires basic mens rea, there being no need to share the perpetrator's state of mind.⁵⁶ However, this interpretation is not undisputed, and the question as to what is the correct mens rea of accessorial liability under English law is a crucial one still requires to be definitively addressed.

Many commentators share the view that accessorial liability requires intentional assistance or encouragement, and that intention in this regard is not related to the concept of purpose, but is rather connected to knowledge.⁵⁷ Thus, knowledge is sufficient to establish accessorial guilt. In this sense, therefore, mens rea signifies only that the accessory intends to perform his action and knows that what he does is capable of assisting or encouraging the commission of the crime.⁵⁸ However, this is problematic because intention itself requires that either purpose, or oblique intent be established, that is, that the actor contemplates the occurrence of the crime to be virtually certain. (According to the Draft Criminal Code and case law before

⁵⁶ Smith, K. *MTLCC*, *op. cit.*, p.153; Williams, G., *TBCL op. cit.*, p.340; Gillies, P., *The Law of Criminal Complicity* (1980), Australia: The Law Book Company Ltd. p. 58.

⁵⁷ See below.

⁵⁸ Smith, J.C., *Criminal Law* (1996), *op. cit.*, p.137; "Criminal Law of Accessories: Law and Law Reform" (1997) 113 *L.Q.R.* 453 pp. 454-463, J.C. Smith indicates that for *basic accessory liability* (original or first crime), which is based on intentional assistance or encouragement, contemplation is enough, while for *parasitic accessory liability* (additional crime), he suggest that the House of Lords should adopt intention, purpose or knowledge of certainty, as the adequate mens rea. This appears to be unusual statement because it seems that the opposite should be suggested. Moreover, it should be noted that in Buxton, R. J., "Complicity in the Criminal Code" (1969) 85 *L.Q.R.* 252; Ashworth *PCL* (1995), *op. cit.*, p. 423; Card, *Criminal Law op. cit.*, p. 558; Curzon, L.B., *Criminal Law* (8th ed. 1997) M&E Pitman Publishing. p. 63; The 1989 English Draft Code in cl. 72(1), all suggest a distinction between consequences and circumstances, requiring intention to the consequences and knowledge to the circumstances. However, two questions arise: Why there is no such distinction linked to the liability of the principal offender by reference to this distinction? Is there any clear distinction

Woollin). These two concepts are fundamental to any discussion of the concept of criminal intention. Many commentators have, however, suggested that an accessory can satisfy the criteria for mens rea even in the absence of proof of purpose or knowledge of the existence of a certainty. Such a view ignores the simple requirement that intending an action is a necessary element in both intention and fault (subjective recklessness); and this sometimes referred to as voluntarily or wilful action. Consequently, the distinction between intention on the one hand and knowledge or recklessness on the other ought to be related to the outcome. Thus, if the defendant's purpose is that the crime should be committed, or he has knowledge, based on virtual certainty, of its future occurrence, then intention is present. Otherwise, it is a matter of fault or recklessness. It is possible that the majority of English commentators are not concerned with this fundamental and important difference and consequently take a contrary view of accessorial liability. However, their position on intention changes in the context of the liability of the principal offender, where they hold that intention is constituted by purpose and oblique intent. Why is intention treated differently? Is there any such distinction? If accessorial intention is not inferred from the general theory of criminal intention, how can one call it intention? Even the House of Lords failed to address this question in *Powell; English* in 1997, declaring, rather, that the general theory of intention is related to principal offenders only and not to their secondary parties.⁵⁹ Why has this issue not been resolved? In fact, there is no obvious reason why English law is hesitant in providing an answer to this anomaly. Accordingly, one cannot continue the analysis

between consequences and circumstances in a criminal offence? There is no clear answer to both of these.

of intention under accessorial liability unless it can be more clearly defined. Therefore, I might at this stage conclude that the mens rea of accessorial liability lies elsewhere.

R. A. Duff, for example, points to two possible explanations for such disharmony regarding the concept of intention in the context of the aiding of crimes.⁶⁰ Firstly, English courts seem to be unwilling to make full use of the defences of duress and necessity, acquitting defendants by manipulating the concept of intention, as in *Fretwell* and *Steane*, or, in a civil context, in *Gillick*. Secondly, since there is no recognition of a lesser offence of ‘facilitating crime’ under English law; a heavy burden is taken on by the courts of either acquitting accessories who only facilitate the principal crimes or of convicting them notwithstanding the triviality of their actions. As it is understood from the general run of cases, English law in this regard favours a conviction. A supportive view of this is found in *Giannetto* (1996).⁶¹ The defendant was charged with the murder of his wife, and the jury asked the judge about what the law requires to establish accessorial liability. The judge explained if someone told Giannetto ‘I am going to kill your wife’ and the husband answered by patting him on the back, saying ‘oh goody’, the husband is an accessory to murder.⁶² This clearly indicates that any degree of assistance or encouragement is sufficient for conviction.

⁵⁹ *R v. Powell; R v. English* [1998] 1 Cr. App. Rep. 261; [1997] 4 All ER 545. A full discussion of this case is in chapter 4, pp. 234-242.

⁶⁰ Duff, R. A., “Can I help you?” *op. cit.*, pp. 167-8.

⁶¹ *Giannetto* [1996] *Crime L.R.* 722; [1997] 1 Cr. App. Rep. 1.

⁶² Smith, J. C., “Criminal Liability of Accessories: Law and Law Reform” *op. cit.*, at 454.

Duff suggests that conviction for assisting crimes should be connected to the concept of purpose and that a new offence of facilitating crimes should be created to embody the activities of persons who knowingly facilitate the commission of crimes.⁶³ This is an interesting suggestion for the English Law Commission to discuss, especially in relation to some dangerous activities, but, in the meantime, if the courts continue using the misleading definition of *intentional* assistance and encouragement, they have, first of all, to discuss the essence of intention in accessorial liability. Consequently, if the courts cannot find a clear and distinguishable answer to this, they have to expressly use the concepts of knowledge or recklessness to establish the required mens rea of accessories.

Many conflicting views have been expressed on the issue of accessorial mens rea under English law, but most of them have merely resulted in further doubt and uncertainty, (which in fact is a difficulty in the case law in this area). However, as mentioned above, discussions of criminal intention regarding accessorial liability tend to be conflicting. This view is supported by two cases: by the House of Lords in *Powell; English* (1997) where it was declared that intention, according to *Moloney* and *Nedrick*, which was supposed to deal with general issues of mens rea, is not applicable to the issue of accessorial mens rea; and also by the judgements in *Blakely and Sutton* and *Gamble*, which indicate that criminal intention is not the minimum requirement of accessorial liability and that probably the current mens rea for such liability is grounded on subjective recklessness, except in the case of procurement, which requires proof of intention.

⁶³ Duff, R. A., "Can I help you?" *op. cit.*, p. 168.

Louis Westerfield claims that *Gamble* attempted to divorce the concept of criminal intent from knowledge, and that only the latter concept is sufficient to establish the mens rea for accessorial liability. The essence of this approach is that it affords the prosecution the power to prove accessorial liability more readily.⁶⁴ The discussion of the mental element in accessorial crime is very problematic; this was the experience of the team which participated in drafting the English Draft Criminal Code of 1989.

For example, I. H. Dennis points that:

“It is betraying no secret to say that the code team found one of the hardest parts of their work the drafting of the provisions dealing with parties to crime. In particular the mental element for accessories proved an exceptionally complex matter.”⁶⁵

In spite of such difficulties, perhaps the best interpretation is the simple one presented by Catherine Elliott and Frances Quinn. They state that:

“Once the prosecution have established that the secondary party did an act or acts which could help or encourage the principal to commit the crime, they must prove that the secondary party had the *mens rea*. They have to show that the defendant knew or foresaw a risk (subjective recklessness) that the acts and circumstances constituting the crime would exist (as always, they do not need to know that these acts or circumstances would be a crime, because ignorance of the law is no defence). For example, a woman who tells a man to have sexual intercourse with another woman, knowing that he may to have sexual intercourse with that woman, and aware of the circumstance that that woman might not be consenting at the time, could be liable for counselling

⁶⁴ Westerfield, L., “The Mens Rea requirement of Accomplice Liability in American Criminal Law-Knowledge or Intent” (1980) *Missipi Law Journal*, Vol. 51 June/Sept p. 155 at p. 167.

⁶⁵ Dennis, I. H., “The Mental Element for Accessories”, *op. cit.*, p. 40. English Draft Criminal Code 1989, in cl. 27, indicates that: “(1) a person is guilty of an offence as an accessory if; a) he intentionally procures, assists or encourages the act which constitutes or results in the commission of the offence by the principal; and b) he knows of, or (where recklessness suffices in the case of the principal) is reckless with respect to any circumstances that is an element of the offence;” I believe that the team of the Draft Criminal Code 1989 used intention, in accessorial liability, in very broad meaning, to blend the requirement of intention with awareness or recklessness, which follows case law that produced uncertainty to the whole issue. I prefer that they should used cl. 18 (b) which includes oblique intention in deciding the minimum mens rea requirement of accessorial liability.

the offence of rape. For the offence of procurement, recklessness is probably not sufficient, and intention must be proved.

The level of *mens rea* required is very low, because there is no need to prove that the defendant had any *mens rea* as to the fact that he or she would be encouraging or helping the principal. While the courts sometimes talk of 'intending' the help or encouragement, all this appears to mean in this context is that the person acted voluntarily that he or she intended to do what he or she did rather than he or she intended its effect on the principal."⁶⁶

David Lanham supports this by indicating that accessorial liability is based on recklessness whatever the *mens rea* of the substantive offence.⁶⁷ I.H. Dennis, who comments of the degree of knowledge regarding accessorial liability, also takes this view. He states that:

"It is also immaterial the he (the accessory) did not regard the commission of the offence by the principal as probable or likely provided that he realised it was a reasonable possibility."⁶⁸

Some might argue that it is not enough that the secondary party performs acts which in fact aid or encourage the commission of the crime; it must be proved that he intended that the crime should be committed, or was indifferent to whether it would

⁶⁶ Elliot, C & Quinn, F., *Criminal Law* (1st ed. 1996), Longman. pp. 155-156. Cf. Halsbury's Laws of England (4th ed. 1990) Vol. II (I), Lord Halsbury, London: Butterworths. p. 46: "A person cannot be convicted as a secondary party unless he was aware of all the essential matters which make the act done a crime; but he need not have known that the act amounted in law to a crime. Whether an accused was aware of essential matter is to be decided on all the relevant evidence. He can be adjudged to have known if he deliberately close his eyes to the circumstances. Criminal liability as a secondary party arises by virtue of the common law; hence, *mens rea* is required for that party, although the offence is one of strict liability as regards the principal. It is not enough that the secondary party does acts which in fact aid or encourage the commission of the crime; it must be proved that he intended that the crime should be committed or was indifferent whether it would be committed or not. It is not necessary, however, to prove that there was a shared intention between the secondary party and the principal. A person does not become a secondary party to a particular crime by rendering assistance to others knowing merely that the others have some criminal objective in view; it must be shown that he knew that the crime contemplated was the same kind or one of several kinds as that in fact committed."

⁶⁷ Lanham, D., "Accomplices and Constructive Liability" (1980) 4 *Criminal Law Journal* 78.

⁶⁸ Dennis, I. H., "The Mental Element for Accessories", *op. cit.*, p. 48.

be committed or not (as was established in *Gamble*.) In fact, this view is erroneous, for several reasons: the primary reason is that *Gamble* was a leading case that moved the level of mens rea required for the accessorial liability to the scope of knowledge rather than intention. The other reason is that what the above paragraph indicates is closer to the definition of intention rather than knowledge or recklessness, especially given that English law treats a person who shuts his eyes to the consequence of his action as having actual knowledge, and therefore can be said to intend such a result or consequence.⁶⁹ A third reason is that what has been said above is just a continuous misunderstanding of accessorial mens rea. The implication is that the uncertainty that prevails in this area has moved the level of contemplation below knowledge of certainty to something close to suspicion. Thus, such a statement does not reflect the reality of the issue and its contradiction is reflected in the later cases of *Blakely and Sutton*; *Maxwell*; and *Chan Wing-Siu*. This would seem to indicate that subjective recklessness is the minimum requirement of accessorial liability, apart from in the case of procurement.⁷⁰

⁶⁹ *Antonelli and Baraberi* [1905] 70 JP 4; *Davies Turner & Co. Ltd. v. Brodie* [1954] 1 W.L.R. 1364, [1954] 3 All E.R. 283; *Thomas v. Lindop* [1950] 1 All E.R. 966; Smith, K., *MTLCC*, *op. cit.*, p. 162 at note 3; Devlin J. in *Gamble* [1959] 1 Q.B. 11 at 23.

⁷⁰ *Blakely and Sutton v. Chief Constable of West Mercia* [1991] RTP 405; [1991] Crime LR 763; *D.P.P. for Northern Ireland v. Maxwell* [1978] 3 All ER 1140; *Chan Wing-Siu v. The Queen* [1985] AC 168. It seems that such a mistake has occurred also in the discussion of American law regarding accessorial liability. For example, Catherine Carpenter points that criminal courts indicate that the common law link the accessorial guilt to the concept of intention, however, on the other hand, the courts are satisfied that the guilt is not related to purpose but knowledge, which is sufficient for conviction. Carpenter, C., "Should the Court Aid and Abet the Unintended Accomplice: The Status of Complicity in California" (1984) *Santa Clara Law Review* Vol. 24, Spring 343 at 348. To avoid such conflict the Committee On standard Jury Instruction in California suggested that: "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes...the commission of such crime." [The Committee On standard Jury Instruction, Criminal, Superior Court of Los Angeles County, California Jury Instruction, Criminal 3.01 (4th rev. ed 1979). Cited in Carpenter, C., *ibid.* p. 349.] This enabled juries to concentrate on deciding that the defendant had knowledge of the principal having intent to commit the crime, and similarly avoided any ineffectual arguments on requiring the accessory to have a criminal intent. By contrast, English law did not seriously take the proposal of LC. No. 43 p. 43 in proposition 7 where it was mentioned that: "Subject to the following paragraphs, a person is accessory to an offence by

Knowledge of the future: what must the accessory know?

It was pointed out that English law focuses on knowledge or contemplation as the corner stone of the mental element in relation to accessorial liability. As Glanville Williams indicates, an accessory is responsible for crimes committed within his purpose or within the intention of the principal offender, of which he has knowledge, and such a matter, under English law, is for juries to decide.⁷¹ However, because of the wider and floating mens rea of accessorial liability, this area is problematic and raises many doubts, confusing the term 'knowledge' with other related concepts such as suspicion, the possible occurrence of two or more crimes, or having no idea that the principal will commit the actus reus. I shall examine, in due course, English case law and commentary.

The focus of this section is a single enquiry, namely, how much must the accessory know of the principal's thoughts on the commission of the crime to incur criminal liability? English law in the past required accessories to know matters essential to the crime. In *Johnson v. Youden*, Lord Goddard JC said:

"Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence."⁷²

reason of conduct described in proposition 6 only if he: intends that the offence be committed; or knowingly helps the commission of the offence with knowledge of the external elements of the offence and any necessary mental state of the principal, and does not act with the purpose of preventing the commission of the offence or of nullifying its effects." The drafters directly indicated that the aim of this paragraph is to distinguish intention from knowledge, which suggests that only the category of assistance minimally require knowledge that a crime will be committed.

⁷¹ Williams, G., *TBCL*, *op. cit.*, p. 351; Card, R., *Criminal Law* (1995) *op. cit.*, p. 561.

⁷² *Johnson v. Youden* [1950] 1 K.B. 544 at 546; *Wilcox v. Jeffery* [1950] 1 All ER 464 at 466; *Davies Turner & Co Ltd v. Brodie* [1954] 1 W.L.R. 1364 at 1368.

There is no clear evidence on what 'essential matters' means, but presumably the Court's desire was to stress the subjective nature of contemplation and that an accessory must have full knowledge. In other words, the accessory should act in concert with the principal offender in bringing about the crime contemplated by both of them.

Departing from this authority, some later cases indicate that accessorial liability does not require accessories to have full knowledge. In *R v. Bainbridge*,⁷³ C bought on behalf of P some oxygen-cutting equipment suspecting that it might be illegally used. After six weeks P used the equipment in breaking into and entering a bank. On the basis of his provision of the equipment, C was charged as an accessory to the robbery on the allegation that he had full knowledge. Notwithstanding his insistence that he only suspected that something might happen, he was convicted, the Judge directing the jury said that:

"the prosecution have to prove these matters: first of all they have to prove the felony itself was committed...Secondly, they have to prove the defendant, this man Bainbridge, knew that a felony of that kind was intended and was going to be committed, and with that knowledge he did something to help the felons commit the crime. The knowledge that is required to be proved in the mind of this man Bainbridge is not the knowledge of the precise crime. In other words, it need not be proved he knew the Midland Bank, Stoke Newington branch, was going to be broken and entered and money stolen from that particular bank, but he must know the type of crime that was in fact committed. In this case it is a breaking and entering of premises and the stealing of property from those premises. It must be proved he knew that sort of crime was intended and was going to be committed. It is not enough to show that he either suspected or knew that some crime was going to be committed, some crime which might have been a breaking and entering or might have been disposing of stolen property or anything of that kind. That is not enough. It must be proved he knew the type of crime which was in fact committed was intended."⁷⁴

⁷³ *R v. Bainbridge* [1960] 1 Q.B. 129.

⁷⁴ *ibid.* pp. 132-3.

C appealed against the conviction, alleging, *inter alia*, that the judge misdirected the jury, and insisting that they should have been directed that for conviction they must be satisfied that at the time when C bought the equipment he knew that it was to be used for a particular breaking and entering. Nevertheless the Court of Criminal Appeal dismissed his appeal, holding that the direction was correct and confirming that 'knowledge is connected to knowledge of the intention to commit a crime of the type which was committed, and knowledge in this regard is not necessary indicated to show of the particular date and premises concerned.'⁷⁵

The term *type* was left undefined by the Court of Appeal, causing vagueness in its interpretation. J.C. Smith argues that since this decision, academic lawyers and law students have suffered sleepless nights worrying about the broader ambit and wider application of knowledge connected to the term *type*.⁷⁶ Perhaps, the prosecution were fortunate with the judgement of *Bainbridge*, merely because it gives prosecutors wider control in establishing the guilt of an accessory in such circumstances. J.C. Smith points to a serious problem caused by stretching knowledge to its extreme limits. The problem arises when an accessory, C, provides the principal with the

⁷⁵ *ibid.* pp.130-134. The Court of Appeal tried to rely on Foster's *Crown Law* (3rd ed. 1809) at p. 369 where he said: "If the principal totally and substantially varieth, if being solicited to commit a felony of one kind he wilfully and knowingly committeth a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt...it was no more than a fruitless ineffectual temptation, the converse, of course, being that if the principal does not totally and substantially vary the advice or the help and does not wilfully and knowingly commit a different form of felony altogether, the man who has advised or helped, aided or abetted, will be guilty as an accessory before the fact." *Bainbridge ibid.* p. 134. However, such reliance is inconsistent with the subjective standard of criminal complicity. It is doubtful that the Court of Appeal made a correct interpretation of Foster's opinion. On the other hand, Foster himself favours objective standard in criminal liability, which is seen, in his view of the 'probable test' under the doctrine of common purpose. See Chapter 4.

necessary object such as a jemmy, keys, or a means of transport in the knowledge that he might use that object to commit robbery or any other type of such crime.⁷⁷ However, where P is convicted, for example, for 20 or 30 burglaries, should C be convicted as an accessory for all those offences in which that object was used? Presumably, under the current situation there is nothing to stop C's conviction of the full number of offences. One might feel that justice, in general, would require C to have knowledge of some of those crimes, but under the current unfocussed and uncontrolled view of mens rea in this area, his liability is not clearly delineated and conviction of all those crimes is quite possible. Hume, the eminent Scottish jurist, proposed, in respect of this problem, that time should be an essential factor in deciding the guilt of accessorial liability. Accordingly, assistance, as a form of accessorial liability, should be connected to an immediate crime, which would disallow conviction of remote and temporal crimes.⁷⁸ However, McCall Smith & Sheldon, argue persuasively that the time factor does not make any difference because the commission of the offence is in the hand of the principal offender and that the accessory often does not have the opportunity of controlling the context of the crime.⁷⁹

The English Law Commission, in its Report no. 43, seems to have wished to establish a similar rule by stating that:

“Where a principal is helped in the commission of more than one offence by a single act of help, the accessory who afforded that help shall not, after having been convicted of one or more of such offences, be convicted of another of such offences of equal or lesser gravity.”⁸⁰

⁷⁶ Smith, J.C., “Criminal Law of Accessories: Law and Law Reform” *op. cit.*, 465.

⁷⁷ *ibid.* p. 456.

⁷⁸ McCall Smith, & Sheldon, D., *op. cit.*, p. 78.

⁷⁹ *ibid.* p. 78.

⁸⁰ LC. No. 43, *op. cit.*, proposition 10, p. 74.

J.C. Smith, strongly and correctly recommends adopting the above proposition to solve the problem of endless convictions created by applying knowledge or contemplation as appropriate mens rea.⁸¹ Having said that, there is a remaining problem, which is that an accessory may still be held liable for a very large number of offences committed by the principal. This is in form of open-ended liability which may, perhaps, seems excessive.

In *D.P.P. for Northern Ireland v. Maxwell*.⁸² C was a member of a violent group who used firearms and bombs to attack Catholics. He was ordered to drive his car to an inn, guiding some strangers who were travelling in a following car. The strangers (principal offenders) threw a bomb into the inn. C was convicted, as an accessory, of unlawfully and maliciously acting with intent to cause an explosion likely to endanger life, contrary to the Explosive Substances Act 1883 s.3 (a), and with possession of the bomb contrary to s.3 (b). C appealed, indicating that he had not contemplated that a bomb would be used, albeit he was aware that a terrorist attack was planned. He said that he thought that some violent activities might take place, but was not sure which specific type of crime would occur. However, the Court of Appeal of Northern Ireland was convinced that C was an accessory, and did not allow his appeal. The case went to the House of Lords where the appeal was again rejected, and the House held that 'A person may be convicted of aiding and abetting the commission of a criminal offence without proof of prior or actual knowledge if

⁸¹ Smith, J., "Criminal Law of Accessories: Law and Law Reform" *op. cit.*, p. 456; *Able* [1984] 1 All ER 277. However, recalling the fact the J.C. Smith was a leading member of the 1989 English Draft Criminal Code, it was a surprise that the Draft Code did not include such a recommendation.

he contemplated the commission of one of a limited number of crimes by the principal.⁸³

Similarly, the Court of Appeal in *Bainbridge*, held that accessories need not know all the details of the offence in which they participate. Suspicion of illegal activities is, however, not enough; accessories must contemplate the type of the offence that the perpetrators might commit, while in *Maxwell*, the House of Lords stated it is enough that accessories contemplate the range of offences that might be likely to be committed. One can argue that both authorities depart from the rule that accessories must have full knowledge, indicating that accessories do not have to share the same degree of knowledge with the main actor who commits the offence.

Knowledge of the future is tentative and no one can predict that something will happen unless they have knowledge of relevant facts.⁸⁴ *Youden* did not define what ‘essential matters’ means, thus retaining some uncertainty as to the proper foundation of this term. Even legal commentary rarely discusses the meaning of the term, which confirms that the issue of ‘knowledge of the future’ is a very difficult concept. Having said that, A. Ashworth suggests that an accessory should know the essential nature of the intended crime of the principal but this does not require knowledge of time, place, or location.⁸⁵ In fact, the decision in *Youden* was intended to stress the subjective nature of criminal complicity and, contrary to the present situation,

⁸² *Maxwell* [1978] 3 All ER 1140.

⁸³ *D.P.P. for Northern Ireland v. Maxwell* [1978] 3 All ER 1140.

⁸⁴ Law Commission Consultation Paper No. 131, *Assisting and Encouraging Crime*, (1993). p. 43; *Harris* [1987] Cr. App. Rep. 75 at p. 78.

⁸⁵ Ashworth, A., *PCL* (1995), *op. cit.*, p. 426.

required a higher degree of contemplation, which should be connected to knowledge of a particular crime that the principal will commit. Currently, according to *Bainbridge* and *Maxwell*, English law has moved to a broader mental requirement, whereas *Youden* was understood as restricting liability to those situation in which there was knowledge of “essential matters” a more limited form of liability.⁸⁶

It is not absolutely certain, however, that *Bainbridge* and *Maxwell* decisions are uniform. According to various legal commentators, *Maxwell* is a modification of *Bainbridge*, and not a new departure.⁸⁷ This is mainly supported by the fact that the House of Lords in *Maxwell* cited *Bainbridge* as an authority. Although many commentators regard *Bainbridge* as the foundation of *Maxwell*, a careful examination of the case suggests the opposite. For example, Viscount Dilhorne, one of the judges who decided *Maxwell*, expressly stated that:

“That case (*Bainbridge*) establishes that a person can be convicted without having knowledge of aiding and abetting the commission of an offence without his having knowledge of the actual crime intended. I do not think that any useful purpose will be served by considering whether the offences committed by the UVF can or cannot be regarded as the same type of crime. Liability of an aider and abettor should not depend on categorisation.”⁸⁸

This suggests that the term *type* has a different meaning from the term *contemplation of the range of offences* in *Maxwell*. Lord Scarman had emphasised that although *Maxwell* is no more than a modification of a principle and sound development of the

⁸⁶ *ibid.* p. 427.

⁸⁷ Williams, G., *TBCL*, *op. cit.*, p. 336; Smith, J., *Criminal Law* (1996), *op. cit.*, p.143; Card, *Criminal Law* (1995), *op. cit.*, p. 561; Elliot, C. & Quinn, F., *Criminal Law*, (1996), *op. cit.*, p. 157. Smith, K. *MTLCC*, *op. cit.*, pp. 166-167 but this was implicitly indicated which suggest that K. Smith is undecided regarding the matter.

⁸⁸ *Maxwell* [1978] 3 All ER 1140 at 1145.

law at this point, it is in coherence with previous cases;⁸⁹ it is evident, however, that *Bainbridge* is a departure from the ‘actual knowledge’ requirement in *Youden*. It is worth noting in this regard that in *Bainbridge* the defence argued that the direction made to the jury should be based on the concept of full or actual knowledge, which is supported by *Youden*.⁹⁰ Nevertheless the Court found that the law at this point is too narrow and wanted to extend accessorial liability to indicate that knowledge of the same type of the crime contemplated is enough to establish guilt.⁹¹ Perhaps the reason behind this approach is that the Court believed that *Bainbridge* was willing to assist the principal offender in the robbery and thus deserved punishment. The hidden reason of the court here might be that there is no other general concept of criminal liability such as facilitating offences or public order crimes to convict the secondary offender and thus there was a need to extend the ambit of the doctrine of criminal complicity. Some might argue that the court had good reason to extend the doctrine but surely the foundation of the concept *type* is contrary to the ‘subjective incrimination’ which is well entrenched in English law, especially in criminal complicity.

One has to go back to Lord Scarman, who sees no distinction between these two leading cases. He indicates that:

“The principle (*Maxwell*) thus formulated has a great merit. It directs attention to the state of mind of the accused: not what he ought to have in contemplation, but what he did have. It avoids definition and classification, while ensuring that a man will not be convicted of aiding and abetting any offence his principal may commit, but only one which is within his contemplation. He may have in contemplation only one offence, or several;

⁸⁹ Lord Scarman in *Maxwell* at p. 1150.

⁹⁰ *Bainbridge* [1960] 1 Q.B. 129 at pp. 130-2.

⁹¹ LC. No. 131. *op. cit.*, p. 43.

and the several which he contemplates he may see as alternatives. An accessory who leaves it to his principal to choose is liable, provided always the choice is made from the range of offences from which the accessory contemplates the choice will be made.”⁹²

From this view, it appears that what did he say earlier was wrong and that *Maxwell* is a true departure from *Bainbridge*. Likewise it might be true to say that *Maxwell* is a recent modification of *Youden*; in both cases the test is based on subjective knowledge, but *Maxwell* interjects an extensive requirement of contemplation. In confirmation of this point, K. Smith correctly indicates that *Bainbridge* establishes a free-floating liability based on objective criteria which links the guilt of the accessory to offences which are totally unforeseen by him, provided that he objectively contemplates a particular type of offences.⁹³

Suppose that the perpetrators in *Maxwell* committed rape or some other kind of sexual assault on residents at the hotel, would C be an accessory? If the applicable test is *type*, there is a possibility that he would be, because the term *type* is very broad in nature and it might be easy to argue that one crime is the same type as another.⁹⁴ Similarly, where C contemplated in general that a crime against the person might be committed, if a rape or sexual assault then occurred, C might be held to have some responsibility for it because sexual offences can be classified within the broad category of crimes against the person. The term ‘*actual contemplation of a range of offences*’, as found in *Maxwell*, is narrower than the above except where the accessory gives the principal a *blank cheque* to commit whatever crime he wants,

⁹² Lord Scarman in *Maxwell* at p. 1151.

⁹³ Smith, K. *MTLCC*, *op. cit.*, p. 167.

and this in fact if put into practice, will push accessorial liability to excessive length.⁹⁵ The House of Lords in *Maxwell* emphasised the subjective nature of contemplation in criminal complicity. The facts in question were that the incident happened in Northern Ireland in the 1970's where violence was causing problems for the British authorities. C was a member of an extremist group, which was well known for violent crimes and the use of guns. Both the Court of Appeal of Northern Ireland and the House of Lords were satisfied that C knew that the other car of the principals contained weapons to be used in an attack; that C was the only person who knew the road and area of the hotel; all of which made him a valuable assistant to the crime.⁹⁶

⁹⁴ Smith, J., *Criminal Law* (1996), *op. cit.*, p. 144; Elliot, C. & Quinn, F., *Criminal Law* (1996), *op. cit.*, p. 157; Smith, K. *MTLCC*, *op. cit.*, p. 168 at note 31.

⁹⁵ The concept of *blank cheque* was mentioned by Lord Scarman when he said that: "An accessory who leaves it to his principal to choose is liable, provided always the choice is made from the range of offences from which the accessory contemplates the choice will be made" *Maxwell*, *op. cit.*, p.1151. Cf. Smith, K., *MTLCC*, *op. cit.*, pp. 170-171, where he argues that the concept of *blank cheque* hardly exists under English criminal law because of the following factors: that such liability would be based on subjective recklessness at large; it brings accessorial liability within criminal conspiracy; there would be a failure to establish the required actus reus; it would bring accessorial liability close to the concept of inchoate offences though the latter is more connected to specific crimes; the secondary party often thinks of a particular crime which he has detailed knowledge and that should be considered. However, the above view of K. Smith is not convincing and perhaps the concept of *blank cheque* will exist, but the question is when. This is supported by the fact that accessorial liability is understood to be based on recklessness, and that the issues of mens rea is much more important than the discussion of actus reus., If the concept of *blank cheque* is applied, it will extend the English version of criminal complicity considerably beyond its current floating boundaries and even from the principle of 'range of offences' mentioned by *Maxwell* itself. Further, if it happens, it will not be a surprise move because English courts, from the time of *Gamble* until *Powell*; *English*, have shifted, in terms of mens rea, the liability of accessories to the broad concept of recklessness rather than intention, and this is implicitly understood to give the court wide authority to control crime.

⁹⁶ How did the English Law Commission address the issue knowledge of the future crime of the principal? LC. No.43 for 1972. is vague regarding this point. The Draft Criminal Code 1989 (Report No. 177), which supposed to codify common law authorities, surprisingly instead of expressly discussing the two tests of 'type' and 'contemplation the range of offences' turned around the problem by indicating, in cl. 27, that an accessory is liable although not aware or does not contemplate a circumstances of the offence such as the identity of the victim, time, or place. While LC. No. 131 prefers *Maxwell*. See also Ashworth, *PCL* (1995), *op. cit.*, p. 428.

An important question has to be addressed at this stage: should an accessory's knowledge of the principal's state of mind be considered as one of the essential matters for accessorial guilt?

This may be answered in two ways. First, it might be said that there is no direct authority in English law from which to draw the conclusion that an accessory must know the exact state of mind of the principal offender, especially given the low mens rea requirement for accessorial liability. Second, the comments of K. Smith stand peerless in this regard.⁹⁷ He says that a distinction should be made between two kind of accessorial liability, that of the 'moving force' and that of any other type of accessories who facilitate the commission or who join after the decision of the principal to bring the crime about has been made. According to K. Smith, accessorial guilt grounded on the notion of the 'moving force' of the crime, should not be based on proof that they knew the principal's state of mind, simply because they created such mens rea and obviously knew of its establishment. By contrast, the proof of the guilt of the other type of accessory should make a quite different demand, namely, it should require knowledge of the principal's state of mind, which should thus be considered as an essential matter. Further, he goes on to suggest that in *conduct crimes*, like theft, there must be knowledge of the mens rea of the principal offender

⁹⁷ K. Smith cites Stephen as an authority to what he proposed. Stephen (Art. 37, *Digest*) said: "when the existence of a particular intent forms part of the definition of an offence, a person charged with aiding or abetting the commission of the offence must be shown to have known the existence of the intent on the part of the person so aided." Also, LC. No. 43; the English Draft Code (Report No. 177); Smith, K., *MTLCC, op. cit.*, p. 179 at note 71. However, Stephen's opinion was linked to common purpose cases and in fact English courts have departed from many earlier authorities such as Stephen's especially in the liability of additional offences. Further, Stephen himself did not establish the distinction between conduct/result crimes. Cf. *Chan Wing- Siu and Powell; English*, which all implicitly suggest that it would be odd to lean on Stephen's view as an authority because the current

because such knowledge is an essential matter. In *result crimes* such as homicide offences, the situation is different: the connection of guilt here is the knowledge of the accessory of the likely rather than the exact mens rea of the principal offender.⁹⁸

It must be borne in mind that the classification of *conduct/result crimes*, in general, is not supported by English case law, nor indeed by legal commentary. In fact, there is disagreement as to who first introduced this classification into English law. Glanville Williams ascribed this concept to J.C Smith, and others attribute it to the well-known Scottish jurist G.H. Gordon.⁹⁹ Whatever its origin, this classification has not been an established feature of English criminal law and lacks authority. A more general objection is based on the fact that the general run of English case law regarding criminal complicity indicates that knowledge of the likely mens rea of the principal offender is enough to constitute accessorial liability. Glanville Williams confirms this by indicating that 'knowledge of the perpetrator's intent or possible intent is sufficient.'¹⁰⁰ By contrast, knowledge of the literal state of mind of the principal offender has two unusual features. First, it probably requires the accomplices to share a similar state of mind, which as matter of fact is not a corner stone of criminal complicity. Second, insisting that the accessory must know the precise mens rea of the principal makes it more difficult to prove knowledge, a result which might not be

situation implicitly suggest that it is enough that the accessory contemplates the likelihood of the principal's mens rea. See Chapter 4.

⁹⁸ Smith, K., *MTLCC*, *op. cit.*, pp. 178-9.

⁹⁹ Ferguson, P.W., "Jurisdiction and Criminal Law in Scotland and England", in R. Hunter., (ed.) *Justice and Crime* (1993), Edinburgh: T&T Clark. p. 97.

¹⁰⁰ Williams, G., *TBCL*, *op. cit.*, p. 351; LC.No. 43, proposition 7 (1) (b) requires help to combine with knowledge of any necessary mens rea of the principal offender; the Draft Criminal Code, (Report No. 177) in cl. 27 (1) (c) indicates that the accessory need to intend that the principal shall act or is aware that he is or may be acting, or he may act with the mens rea required for the offence. While under LC. No. 131 the situation is obscure.

welcomed policy because it might lead to many clear instances of accessories escaping conviction presumably because there is no alternative offence such as facilitating crimes. Third, common sense suggests that knowledge of the future is often seen as an unclear concept, comprising anticipation with some element of suspicion, rather than, a confident expectation that something will happen. In short, presumably the current situation of English law does not favour or allow such a higher degree of expectation, preferring instead to extend the ambit of criminal complicity, which can be called 'the wider net of incrimination'.¹⁰¹

Conclusion:

The issue of mens rea is immensely complex, but a full consideration of it is essential because mens rea is probably the most important element in deciding the circumstances in which accessorial liability can arise. Further, the mens rea issue in this context, that of the degree of knowledge, is one of the most problematic concepts in accessorial liability, and continues to cause a great amount of confusion as to the boundaries of accessorial liability. In spite of this, the policy makers, (criminal courts and the majority of legal commentators) favour the adoption of 'knowledge, contemplation, or recklessness' as the main mental requirements of accessorial liability. Such a policy insists that although this form of mens rea is low, uncontrolled, and brings normal activities into the net of incrimination, it gives English criminal law wider power to control many secondary activities which

¹⁰¹ See Chapter 4, especially the decision of *Chan Wing- Siu and Powell; English*, which indicate that the degree of contemplation is not important.

support the commission of crime.¹⁰² This can be justified in terms of willingness, indifference, or knowledge that such crime will occur in accordance with aid, instigation, counsel, or procurement. If this is true of the current situation of accessory liability in English law, it suggests two conclusions. First, that the mental element falls short of the notion of purpose. Second, the above justifications are very good reasons to move away slightly from purpose. However, a close analysis of the current situation indicates that this is not true: case law has moved far from this proposition and softened the mental element so as to include subjective recklessness, and at the same time ushering in confusion regarding ‘knowledge of the future’.

It is true to say that English criminal law concentrates on knowledge, contemplation or any word suggest a similar meaning, instead of intention as the appropriate mens rea. Such a view does not look on terms such as willingness, indifference, or ‘having a stake in the outcome’ in order to determine contemplation. Instead, the concept of contemplation is rather more amorphous, which can be understood as to include recklessness. Although one might suggest that courts and legal commentary mention intention and knowledge as the requirement of all mens rea, the current mens rea required under English law is a low degree of anticipation, akin to recklessness.

Further, some of those who advocate such an attenuated state of mind as being sufficient to constitute mens rea decline to recognise that it could possibly lead to an infringement of the rights of an accessory. For example the liability of the principal

¹⁰² *Powell*; *English* [1998] 1 Cr. App. R. 261 at pp. 235-243; *Times Newspaper*, October 31 1997; *Chan Wing- Siu v. R* [1985] 80 Cr. App. Rep. 117 at 172, 282; Williams, G., *Criminal Law: The General Part* (2nd ed. 1961), London. p. 397.

is more clear-cut, and easier to argue for acquittal in relation to causation and mens rea. In accessorial liability is covered by uncertainty that we have already seen in causation and the low requirement of mens rea. Moreover, even in procurement, the prosecution charges the accessory with the general formula of *aiding, abetting, counselling and procuring*, which does not help the accessory to prepare his defence in terms of a clear focus. Likewise, the punishment of the accessory is at the same level as the convicted accomplices, does not reflect the fact the accessorial activities are different; some are trivial, insignificant, or unimportant while others are crucial to the crime, and may be little separated from the principal's action, especially from the point of mens rea. The courts should have this in mind when deciding the appropriate punishment.

A few final comments might focus on the views of a legal commentator who accurately concludes that English law needs to move from the current attitude towards accessorial liability, to one based on a more accurate analysis of mens rea.

K. Smith says:

“Introducing (or reintroducing) purposefulness into complicity would reduce objections of this nature. Requiring an accessory to act both with purpose of encouraging or assisting the principal, and also with similar level of culpability (except for strict liability) in respect of circumstances and results to that necessary for principal liability, offers an even more measured and appealing correlation between and principal fault demands. Indifferent, non-purposeful assistance, presently punished as complicity, could then more appropriately be treated as less serious liability...dividing secondary participation in such two-tier fashion would probably reflect conceptually distinguishable types of criminality. A change of this nature would constitute a desirable refinement of possible roles which non-perpetrators may perform, and more harmoniously complement modern attempts to grade principal culpability with greater subtlety.”¹⁰³

¹⁰³ Smith, K., *MTLCC*, *op. cit.*, p. 196.

This opinion could well be considered and adopted in the English version of accessory liability, but the English Law Commission in their last report no. 131 declined to adopt it. In fact, notwithstanding the *Chan Wing/Powell* principle, English law should use criminal intention, usually discussed for the principal liability, as the main area of discussion regarding the required mens rea for accessory liability. As mentioned before, such intention should contain purpose and oblique intent, which is based on higher degree of contemplation and can include a state of indifference which should be the required mens rea for accessory liability. Any other form, if sufficient, should be a crime on its own outside the net of criminal complicity.

UAE Law

(A) General requirements of mens rea:

Two elements constitute mens rea in the F.P.C: intention and fault. The former means that the accused desires or accepts the criminal result caused by his voluntary action, while the latter means that the accused contemplates or fails to contemplate an undesired result caused by his risky action. It must be noted that the principle: *actus non facit reum, nisi mens rea* is applicable to every offence in criminal law. This means that the UAE law does not apply the concept of absolute liability, which is known in English criminal law as strict liability, where the accused's state of mind is immaterial as far as liability is concerned.

The aim of this section is to fill in the gaps, to understand the meaning of mens rea under the F.P.C., if that can be achieved, and to see how Arabic jurisprudence conceives of such a cornerstone of criminal responsibility.

(a) Intention:

Intention is defined in article (38):

“The *mens rea* of a crime consists of intention or fault. Intention arises when the accused's will moves towards the commission or omission of an act,

where such commission or omission is legally defined as a crime, for the purpose of producing a direct effect or any other criminal result which the offender has expected.”

The F.P.C. is vague regarding the core meaning of the term intention and there is no official explanation to rely on to infer its definition. Legal commentators’ views as to intention are that this state of mind arises when the accused desires the criminal result caused by his voluntary action with the knowledge of the essential elements that determine his criminal action. Another definition is the willing of the action and the result. For instance, A. F. Sorrow defines intention as ‘wilful action which brings about a desired result compounded with the knowledge of the essential element required by the law to constitute an offence.’¹⁰⁴ Consequently, intention under the F.P.C. has two meanings: wilful action that brings about the desired result and the knowledge that the behaviour will have a particular result and the desire that this result should come about. This first meaning is the major key to distinguishing intention from fault, whereby in the latter the accused engages in risky behaviour. In such a case, he does not want the result to come about although he has a very high degree of foresight that the prohibited result will occur.

The second related meaning of intention is: the knowledge of the essential element required by the law. This is called the knowledge of facts, which the accused must know. The absence of such knowledge would affect his intention and might save him from conviction. Knowledge covers the following situations:

Knowledge of every aspect of the actus reus:

¹⁰⁴ Sorrow, A., *Alwaseet fee Qanon Alokobat: Alkesm Alam*, (Arabic. *Explanation of Penal Code: The General Part*) (6th ed. 1986), Egypt: Dar Alnhda Alarabia. p. 348.

Every offence has an actus reus, in other words, criminal conduct which the penal code defines. The accused must know every aspect of his criminal conduct, such as knowledge of the subject that the law protects in those cases where the accused's action has caused harm to it. An example of this is in murder. The accused must know that he is planning or directing his actions against a live person. The definition of murder requires that the accused must intend the death of the victim; for instance, A thinking that B is dead, takes his body and throws it from a mountain which in fact causes B's death. A cannot be convicted for murder under UAE law unless he has the required intention relating to a live person even if he might be convicted of manslaughter.¹⁰⁵ In theft, the required mens rea is depriving another of his movable property. If the accused thinks that such property belongs to him, he cannot be convicted of theft. Another aspect of knowledge of the actus reus applies in certain offences, in which the accused must know the identity of other persons, things or the time of the offence. An example is provided by article (150) of the F.P.C., which punishes any person who instigates a member of the UAE army to join another country's forces during the war. Thus, the accused must know there is a war going on; the absence of such knowledge would prevent his conviction.

Knowledge of aggravated circumstances that affects classification of offences:

Article (41) of the F.P.C., states:

“A defendant who is ignorant of the aggravating circumstances that change the classification of a crime, shall not be responsible accordingly; however, he may benefit from the mitigating factor although he is ignorant thereof.”

¹⁰⁵ Compare with *Thabo Meli v. R* [1954] 1 WLR 228; [1954] 1 All ER 373, where there was a conviction.

Consequently, the F.P.C. lists certain circumstances which, if they arise in the commission of a crime, may change the classification of the crime from misdemeanour to felony or, on the other hand, change the crime from the scope of one governing article to that of another. These surrounding circumstances are an essential element of the latter article. Where the accused's knowledge is absent, the latter offence will not arise. An example of this is 'simple theft', which is a misdemeanour governed by article (390). If the offender uses coercion, the governing article will be (385), 'felony of theft compounded by coercion.' That is to say, if the offender during the commission of theft assaults the victim by mistake, he is not blamed as a felon. Another example is carrying a weapon while committing a theft. This changes the offence from misdemeanour to felony. The offender must know, however, that he is carrying a weapon. If someone has planted the gun on the accused without his knowledge and the police arrest him, he cannot be convicted of a felony; he must have knowledge of that aggravating circumstance.

However, there are some minor facts which the accused does not have to know, and the absence of the knowledge of these would not affect his criminal liability. Some of the minor facts are:

The aggravating circumstances that intensify punishment: Another form of aggravating circumstance in the F.P.C. is that which only intensifies the punishment without changing the governing article. Each offence has an upper and lower

boundary. If such aggravating circumstances arise, the judge will intensify the punishment to the upper boundary.¹⁰⁶

The circumstances in question are divided into: general circumstances applying to every offence¹⁰⁷ and specific circumstances required by single offence.

An example of the second is article (388):

“... Punishment by imprisonment for at least five years and at most seven years shall be inflicted for an act of theft if it is committed by a workman at his place of work or it causes damage to his employer.”

According to legal commentary, the aggravating circumstance in the previous article is theft committed by a workman. For example, if the workman steals property, which he thinks belongs to the employer's guest while it in fact, it belongs to the employer, he is blamed for those aggravating circumstances. However, it must be pointed out that nothing in the F.P.C. suggest this which indicates that the offender should have knowledge of such aggravating circumstance.

¹⁰⁶ Article (103) states that: “Where there is an aggravating circumstance, the court may impose penalty as follows:

- (1) if the principal penalty for a crime is a fine, its maximum limit may be doubled or a judgement of detention may be awarded,
- (2) if the principal penalty for a crime is detention, its maximum may be doubled,
- (3) if the principal penalty is imprisonment with a maximum period of less than fifteen years, the penalty may be imposed to such an extent,
- (4) if the principal penalty for a crime is temporary imprisonment with a maximum period, it may be commuted to life imprisonment.”

¹⁰⁷ Article (102) states:

“Without prejudice to the cases in which the law states special causes for severity, the following shall, *inter alia*, be considered to be aggravating circumstances:

- (1) commitment of a crime for a vicious motive,
- (2) commitment of a crime, by exploiting the victims mental element weakness or his inability to resist, or circumstances where are unable to defend himself,
- (3) commitment of a crime in a savage way or by mutilating a victim,
- (4) commitment of a crime by a public official, by taking advantage of his official authorities or his capacity, unless the law provides a certain punishment, owing to such a capacity.”

The occurrence of a result that is more serious than that intended by the offender:

Generally, when a person decides to act in a particular way he will be anticipating a particular result which he wishes to bring about.

However, sometimes a more serious result may occur. As an exception to the general principles of criminal liability, the law here blames the accused for that more serious result even if he did not contemplate its occurrence. An example is afforded by article (336):

“Whoever assaults another person physically in any manner without intending murder, but the assault leads to death, shall be sentenced to imprisonment for a period not exceeding ten years.”

According to this article, the accused only intends the offence of assault. However, his action causes the death of the victim; he is responsible for the death even if he does not contemplate it. There are a few similar articles in F.P.C., which make the accused responsible for any more serious result for his action. These are ‘violation of freedom’ (344), ‘exposure to danger’ (349), and ‘crimes committed against honour ‘rape and indecent acts’ (357). Here the knowledge of the occurrence of the more serious result is minor in the eyes of the law and it does not affect the accused’s intention.

Forms of Intention:

(1) Direct Intention:

This form is often called general intention. It has two meanings:¹⁰⁸

¹⁰⁸ It must be noted that the F.P.C. neither expressly nor implicitly suggests such classification. It is merely provided by legal commentaries.

a) *First degree purpose*: A person desires a particular end to his action; it arises when he commits a voluntary action and his aim, object, or desire is to bring about a prohibited end prescribed by the law. For example, the intention required for murder is the death of the victim; in theft, it is to deprive another of his property. This is called *first degree purpose*.

b) *Second degree purpose*: Intention is also considered direct when the offender's purpose is to bring about a result, and when his action will inevitably cause another result. For example, A decides to bomb an aeroplane intending to damage the plane only, being motivated by malice towards the airline. His purpose is to damage the plane, but where the death of passengers is inevitable, he is regarded as having intended the deaths. *Second degree purpose* is the term used to describe this form of intention.

(2) Oblique intention:

Another form of intention is oblique intention, which is not identified by the F.P.C. This concealed form of intent is vague controversial and disputed in Arabic criminal jurisprudence, (the reasons for this are stated at the end of the chapter) which suggest that it is of questionable application in UAE criminal law, at least from the point of view of the principle of legality. Having said that, it could be said that oblique intention occupies a middle position between intention (purpose) and contemplated fault (subjective recklessness). The issue is disputed and there are two schools of thought on the notion of this form of intention. They may be summed up as follows:

a) *School One*: Most Egyptian legal commentators tend to prefer the following meaning:¹⁰⁹ ‘Oblique intention’ is a type of intention based on direct intention. That is to say, when an offender intends to bring about a particular result a more serious result might occur, and the offender will be responsible for this, even though he did not contemplate the more serious result.’ Interpretation suggests that there must be first a purpose to cause a criminal result and if such a purpose is absent, the accused may not be responsible for the more serious result. For example, A assaults B which causes B’s death. A’s intention is only to assault, he did not contemplate the more serious result which is death. The law blames him here because he ought to contemplate such a result and his intention in this case is oblique. The ambit of this type of intention does not cover every offence, it needs to be stated expressly, and the accused need not contemplate the result. In other words, this type of intention is not a general principle and applies only to certain offences such as assault and rape. If the victim killed following the action, the accused is responsible for the death. One explanation of this is that criminal law in this type of intention is more concerned with the result rather than requiring the accused to have actual knowledge of the occurrence of the more serious result. The test in certain offences is objective; the accused is expected to contemplate a result where a reasonable man would do so.¹¹⁰

¹⁰⁹ Husni, M., *Alnadaria Alama le Alkasd Aljenai*, (Arabic. *General Theory of Criminal Intention*) (3rd ed. 1988), Egypt: Dar Alnhda Alarabia. pp. 281-285.

¹¹⁰ Supporters of this first school of thought are: Rashid, A., *Muqdimah le Mbadee Alnadaria Alama*, (Arabic. *Introduction to the Principles of the General Theory*) (1974). pp. 362-367; Alsaeed, M. A., *Almbadee Alama le Qanon Alokobat* (Arabic. *The General Principles of Penal Law*) (1962), Egypt. p. 400; Alkullaly, M. M., *Almasulia Aljenaia*, (Arabic. *Criminal Responsibility*) (1948), Egypt. p. 188; Ismaeel, M. A., *Sharh Alquaed Alama le Qanon Alokobat*, (Arabic. *Explanation of the General Provisions of the Penal Code*) (1951). p. 392; and others. See: Husni, M., Husni, M., *Sharh Qanon Alokobat: Alkesm Alam*, (Arabic. *Explanation of the Penal Code: The General Part*) (6th ed. 1989), Egypt. pp. 618-623; (Arabic. *Criminal Intention*), *op. cit.*, pp. 270-292.

b) *School Two*: A few current commentators support a second meaning, which can be defined in comparison with direct intention.¹¹¹ In direct intention, the accused certainly contemplates the occurrence of a desired result that the accused's aim or object is to bring about. In oblique intention, the accused does not contemplate that the result will happen for certain; it is either a probable or possible consequence of his voluntary action, nonetheless, he accepts the occurrence of the result.¹¹² An example of this is: Z is driving at speed in a city. He must contemplate that someone may cross the road, but he does not care and would accept killing or injuring anyone. Z might be convicted under oblique intention if he kills or injures a pedestrian. It must be noted that scholars who support this second view are distinguishing between a state of blindness and a person who does not care about causing a result and accepting the occurrence of a probable result. The latter only is oblique intention.¹¹³

Proponents of this position hold that this type of intention is an independent form of direct intention, which does not rely on a purpose and covers every crime requiring intention without express provisions. Finally, it is based on actual foresight of an

¹¹¹ Supporters of this second school of thought are: Husni, M., (Arabic. *The General Part*), *op. cit.*, pp. 617; (Arabic. *Criminal Intention*), *op. cit.*, pp. 270-292; Sorror, A., *op. cit.*, pp. 356-357. Others are either generally supporting such view but with some slight modification, which can bring some confusion at the same time, such as Mustafa, M.M., *Sharh Qanon Alokobat: Alkesm Alam*, (Arabic. *Explanation of the Penal Code: The General Part*) (10th ed.1983), Cairo: Cairo University Press. p. 435; Rabia, H., *Sharh Alquaed Alama le Qanon Okobat Alemarat Alarbia Almutheda: Alguza Alawal, Almbadee Alama le Aljarima*, (Arabic. *Explanation of the General Part of UAE Penal Code: Part One, The General Principles of Crime*) (1993), Dubai: Albayan Press. p. 311; Or refusing the idea of oblique intention in general such as Mahdi, A., *Sharh Alquaed Alama le Qanon Alokobat: Dirash Muqarana bean Qanon Alemarat Alarbia Almutheda (Abu Dhabi, Dubai, wa Mashrua Alqanon Alithadi) wa Alqanon Almassri* (Arabic. *Explanation of the General Rules of the Penal Law: A Comparative Study between UAE Laws (Abu Dhabi, Dubai, and the Draft Federal Penal Code) and the Egyptian Law*) (1983), Cairo: Atlas Publication. pp. 215-221.

¹¹² Husni, M., (Arabic. *Criminal Intention*), *op. cit.*, p. 294.

¹¹³ *ibid.* p. 284.

uncertain result.¹¹⁴ Both schools fails to provide a satisfactory answer to the problem of oblique intention under the F.P.C.; the reasons for this will be pointed out later in this chapter when I shall discuss the need to reform the F.P.C.

(3) Specific intention:

In principle, general intention in its direct meaning would cover every crime where required by the F.P.C. Thus, general intention in this respect is the knowledge that the behaviour will have a particular result and the desire that the result should come about. However in the case of certain crimes the F.P.C. requires a certain motive or specific element to constitute the crime in question and the general intention would not be sufficient. The requirement of a specific motive here is an exception to the general principle in article (40), which states that 'A motive to commit a crime shall be immaterial, unless the law provides otherwise.'

An example of specific intention, for instance, is provided by the mens rea in theft, which requires that the accused deprives another of his property. When, however, the accused takes a piece of property of another person and destroys it, his action does not constitute theft, although he might be convicted of damaging property belonging to others.¹¹⁵ Another example of specific intention in the F.P.C. is found in article (216), (the offence of forgery of instruments), where the specific intention is stated expressly:

¹¹⁴ *ibid.* pp. 27, 272.

¹¹⁵ Article (424) of the F.P.C.

“Forgery of an instrument is a change of its authenticity by any of the means stated herein after, resulting in damage, for the purpose of using it as a valid instrument.”

Such absence of specific intention would either mean the accused’s action would not be legally culpable, or would require change in the governing provision from one article to another.

(b) Fault:

The second notion of the term *mens rea* is fault. However, the F.P.C. has not precisely defined fault, even if a mention is made of various forms of fault. Article (38) states:

“...Fault arises if a criminal result occurs by reasons of the defendant’s fault, whether such a fault is negligence, indifference, carelessness, recklessness, imprudence or non-compliance with laws, regulations rules or orders.”

As has been shown, the concept of fault is a broad umbrella term containing various mental states, broader than then usual, and there is no equivalent of this term in the common law systems, as in the case of English law. Commentators define fault as “A demeanour that does not comply with the precaution that is required by social life.”¹¹⁶ Another effort to define the term is: “a dereliction of human behaviour that would not be done by a reasonable person in the same circumstances.”¹¹⁷ A further definition is: “A voluntary action to commit a risky situation where the person ought

¹¹⁶ Obaid, R., *Mbadee Alkesm Alam menn Alqanon Alikabi*, (Arabic. *Principles of the General Part of the Penal Code*) (4th ed. 1979), Cairo: Dar Alfeker Alarabi. p. 675.

¹¹⁷ Mustafa, M., *op. cit.*, p. 447.

to act with a duty of care.”¹¹⁸ As it can be seen from the above definitions, the term fault is based on the idea of breaching a duty of care, which causes an undesired result, prohibited by the law. The offender contemplates a result from his own action or fails to contemplate the result where he ought to.

The standard of duty of care is usually based on two notions: an expectation of knowledge and obligations created by the law. In relation to human knowledge, everyday experience gives us the knowledge of what is safe and what is dangerous. People have a minimum standard of knowing risks, especially if such knowledge comes from field or work experience.¹¹⁹ Driving a car without a safe breaking system would entail a high risk for other road users. A race between two cars would carry a huge risk to the drivers and pedestrians. A football player, acting in an aggressive manner without regard to the rules of fair play might cause injuries to other players. Leaving a baby near a fire might result in the baby’s death. All these examples would bring about a result, albeit an undesired one. The actions create the undesired result, the accused either has given thought of what might happen or he has failed to give such thought where he ought to.

The second notion, which constitutes the standard of duty of care, comes from legal obligation. Commentators refer here to law in a broad sense, even from outside the provisions of criminal law, such as civil law, traffic laws, health regulations and

¹¹⁸ Mohammed A., *Qanon Alokobat: Alkesm Alam*, (Arabic. *Penal Code: The General Part*) (nd.), Egypt: Dar Almatboaat Algamaia. p. 256.

¹¹⁹ Rabia, H., *op. cit.*, p. 382.

regulations governing certain groups attitudes or custom.¹²⁰ All of these laws or regulations impose upon their members a duty to act with care. Such a breach of duty of care would be fault if there is an occurrence of a criminal result prohibited by the Penal Code. However, a breach of that duty, whether coming from breaching legal obligations or failing to achieve a minimum standard of knowledge, must have caused the criminal result in question. In other words, there must be a causal link between the fault and the result before the person can be charged with a criminal offence.

Certain points must be noted in relation to liability for fault:

In spite of the fact that the F.P.C. has provided an example of this form of liability without defining the term itself, it is true to say that fault would be presented in the following forms:

a) Advertent fault: This form arises when an offender contemplates the occurrence of a prohibited result from his dangerous behaviour. However, he continues his action with the hope that either the result would not occur, or he would avoid such occurrence depending on his ability. For example, Z wants to try out his new sports car on a city road. He contemplates the fact that he might kill or injure pedestrians, but he uses the car nonetheless, and depends upon his own ability to drive. However, he causes the death of B. Z might be convicted of manslaughter.

b) Inadvertent fault: This form arises when an accused has given no thought to causing a prohibited result arising from his dangerous action, in circumstances in

¹²⁰ *ibid.* p. 329.

which a reasonable person would have given such thought. An example of this is: a baby-sitter leaves a child without thinking the child might interfere with an open fire, which burns the child's hand. The baby-sitter might be charged with causing injury by fault.

Both advertent and inadvertent fault would cover the examples of fault mentioned in article (38).

c) Subjective or Objective: Although the F.P.C. does not make this requirement, legal commentators favour objective tests rather than subjective ones to decide the accused's state of mind. The objective test is based on the concept of the reasonable person, often called the standard of reasonable man. In theory, this rational man must be taken from the accused's class or society, and put in the same circumstance in which the offender caused the result. If this rational man foresaw a result, the accused is also expected to have foreseen it. For example, if M, a person with specialist knowledge, causes an injury to B, the presumption of the reasonable man test in determining M's liability will be based on an ordinary person from the class of persons with such specialist knowledge, in the exact circumstances of M's action. If that ordinary person foresaw a risk in that situation, M ought to have contemplated the risk, which determines his liability.

d) The degree of fault: The F.P.C. does not mention the degree of awareness of risk needed to constitute fault, that is to say, the Code does not distinguish gross fault from slight fault; this accords with the scholarly consensus. It might be true to say that the F.P.C takes the same approach as the UAE Civil Code, especially article

(282), which does not distinguish the degree of fault in civil liability. Consequently, a slight fault is sufficient to constitute criminal liability if there is a causal link between the action and the result.

Another argument which supports this opinion is found in the principle of the unity of civil and criminal decision, stated in article (269) of the UAE Penal Procedures Law, which states that:

“A conclusive penal judgement given on the merits of a penal action for innocence or conviction is considered determinative effect and shall be adhered by civil courts in actions that have been conclusively decided concerning the occurrence of crime. A judgement of innocence shall have such force whether the charge is non-suited for lack of any cause of action, or whether the accused is discharged for insufficiency of evidence. However, the judgement shall not have such force if it is based on the fact that the incident is not punishable by the law.”

The determinative effect of a criminal case on a civil case, where the victim is suing the offender for causing damage, would logically lead us to say that the degree of fault is irrelevant when bringing a case to criminal courts, which would give the victim the chance to obtain an indemnity.¹²¹

¹²¹ Mustafa, M., *op. cit.*, p. 475; Rabia, *op. cit.*, p. 350.

(B) The mens rea of accessorial liability:

As has been mentioned above, the F.P.C. specifies two forms of mens rea: intention and fault. Because of this, there is no absolute liability. The prosecution in the UAE, therefore, needs to establish mens rea before charging a person with a criminal offence.

The principle to be addressed at this stage is the required mental element for accessories under the Arabic version of criminal complicity, in order to see if it is based on coincidence of accomplices' mens rea in criminal complicity. The latter means that when the theory of complicity is in question, this principle arises which indicates that there must be coherence between the accomplices' states of mind. In other words, there can be no charge of complicity unless the parties have the same mens rea relating to the offence in question. That is to say, where a perpetrator intentionally commits an offence with an accessory who is involved through fault, both will have a separate degree of liability.¹²² An example of this is: Z recklessly leaves a loaded gun on a table. B comes and takes it to kill M. Z is not an accessory to B's crime of murder since there is no joint state of mind. Having said that, the following discussion shall not be taken as to entirely represent the UAE criminal system, especially the coincidence of accomplices' mens rea, but it could be said that many features are in harmony with the F.P.C. This will be examined carefully later in this chapter. Thus, the early discussion concentrates on the view of Arabic

¹²² Mustafa, M., *op. cit.*, p. 364.

jurisprudence. Consequently, since the principle in question requires a coincidence of accomplices' mens rea, our target is to see how does this principle exist in accessorial criminal liability within the required state of mind; offences of intention and offences of fault.

(A) The coincidence of intention:

Many offences can only be committed intentionally, for instance: murder, theft, fraud, assault, rape. The accused's aim in these examples is to bring about the prohibited result as stated in the definition of that offence. The coincidence of intention requires that an accessory must have an intention that the perpetrator brings about the prohibited result, that is to say, all accomplices involved in offences of intention must share the same intention as stated in the definition of the offence. For example in murder, the intention of the accessory must be that the perpetrator kills the victim. In theft, he or she must intend that the perpetrator deprives the owner of the property. If there is no joint intention between them, each has his separate liability. That is to say, no charge of complicity arises unless there is a coincidence of intention between the parties. How can such coincidence be identified? Putting it another way, how can an accessory join the perpetrator in his offence? Do they need to sit together and discuss the plan to exchange roles, or is it sufficient that the accessory can participate without the accused's knowledge?

It should be pointed out that in Egypt, until 1950, the belief was that the coincidence principle must exist in a particular form, which is a previous explicit agreement or at

least a tacit agreement between the parties to commit the offence.¹²³ In other words, the evidence of coincidence of intention requires that there should be plotting and discussing roles between the accomplices; which leads to the conclusion that the requirement was that the parties must know each other's roles which exist in terms of a conspiracy to commit the offence, whether the agreement is before or during the commission of the offence. An example of this is as follows: A undertaking a bank robbery at night. B, a security officer, discovers him, but instead of arresting A, he shows him an easy way to escape. Although there is no explicit conspiracy between A and B, there is at least a tacit agreement that the offence should be committed.

The weakest point to arise as implication from the previous view is that many incidents would be excluded from the scope of criminal complicity although there is a coincidence between the parties' states of mind. For example, M, is a security officer who knows of a gang's intention to rob his employer's house, opens the door of the house before the gang arrives, intending that the owner's property be stolen. In fact, they do that with M's assistance. However, they do not know what he has done for them. According to the 'agreement' view, M is not an accessory to the gang's offence since there is no agreement between them. Another example of how this view might exclude significant acts is in the following: B wants to inherit his mother's estate quickly, and so puts some poison in her medicine. M, his older sister, finds out. As a matter of experience, she recognises that the quantity is not sufficient to kill the victim. When B is out, the sister puts a bottle of poison in his room intending him to use this to kill their mother, which in fact he does. M, according to

¹²³ Husni, M., *Almushraka Aligramia fee Altashreat Alarabia*, (Arabic. *Criminal Complicity in Arab*

scholarly opinion, at that stage is outside complicity provisions because there is no knowledge between the parties.

Both examples deal with the form of assistance in complicity, which represents a strong argument against applying the 'agreement test.' In other words, the problem exists only in the provision of assistance where the other forms, incitement and conspiracy, requires that the parties know each other's roles. From 1950, the Egyptians started to think of the consequences of the agreement test, which was the first step to moving away from this unsuitable test of requiring agreement between the accomplices. This was the case when the Egyptian Court of Cassation overruled the agreement test when it was held that:

“Only what the law requires, is that the accessory know that the perpetrator is committing an offence and assist him to complete its commission.”¹²⁴

Although this decision was concerned with assistance in complicity, legal commentators point out that the effects of the decision cover the other forms of complicity, namely incitement and conspiracy. This means that a previous agreement to commit an offence is not a necessary condition in order to prove the coincidence of the accomplice's mens rea.¹²⁵ The principal does not need to know of the accessory's participation, the accessory must know that the principal is to commit or is committing the offence and must share that intention with the principal. The coincidence of mens rea must be compounded with causation, that is to say, there must be a causal link between accessory participation and the result.

Codes) (2nd ed. 1992), Egypt: Dar Alnhda Alarabia. pp. 27-8.

¹²⁴ Egyptian Cassation Court Case No. 230, 30/5/1950, Y. 1 *Majmuat Ahka'am Mahkama'at Alnaqad* (Arabic. *Decisions of the Egyptian Cassation Court*), Egypt. p. 709.

As it appears, intention in accessorial liability is governed by the general theory of criminal intention, which has been stated previously.¹²⁶ This means that accessorial intention is identical to the perpetrator's intention. One important thing, which is not shared, of course, is the action to bring the result, which the perpetrator does. Therefore, one can infer accessorial intention from a wilful action compounded with desire on the part of the accessory that the perpetrator bring about the prohibited result. That is to say, the picture of an accessory's intention is composed of two elements: knowledge of the offence and wilful action to participate.

(1) Knowledge:

The accessory must know the consequences of his action and the unlawful action being committed. In other words, he must realise what he is doing and that his action might lead him to be involved in an offence. He must contemplate that what he does might encourage or help another to bring about a criminal result. In encouragement, the encourager must know that his words will lead the perpetrator to commit an offence. In assistance, the accessory must contemplate that the assistance he provides will be used in committing an offence. Since the aspects of this knowledge are identical to the perpetrator's knowledge discussed above, I refer to that section.

(2) Wilful action:

Contemplation of consequences is not enough; the accessory must intend his action. Intention here means a desire that the perpetrator bring about the prohibited result,

¹²⁵ Husni, M., (Arabic. *Criminal Complicity*), *op. cit.*, p. 28.

that is to say, the accessory's purpose is to influence or help the perpetrator to commit the crime in question. As has been pointed out, the notion of the accessory's intention is derivative from the general theory of intention in criminal liability. This means that the accessory must contemplate the consequence of his involvement, compounded with the desire that the offence occur. In incitement, the encourager must intend to persuade another to commit a particular offence. Suppose, for example, M says to B, 'if you are man enough, go and teach D a lesson.' This he says as a joke, without intending that B assault D, which he does. M probably cannot be charged as an accessory to assault if the evidence shows that there is no joint intention between M and B, even if M contemplated that assault would take place. In assistance, consider this example. M sells D cutting equipment with a high degree of foresight that D might use it to commit an offence. D uses the cutting equipment for a robbery. The prosecution in this example cannot charge M as an accessory simply because he contemplated the occurrence of the offence. To charge M, there must a proof that he intended to participate in D's offence. Foresight without desire cannot be a ground of accessorial liability in intention offences.¹²⁷ On this issue, Husni oddly provides us with examples, starting:

"A person who provides or makes an imitative key for another person with the contemplation that the other will use it to commit theft, does not have the requisite mens rea for complicity because his interest is in money only."¹²⁸

He adds another example, where he says:

¹²⁶ *ibid.* p. 359.

¹²⁷ *ibid.* p. 354.

¹²⁸ *ibid.* p. 358; Rabia, H., *op.cit.*, p.431, who suggests the same regarding accessorial liability in the UAE.

“A person who designs a police uniform which he sells or lends to a person cannot be charged of complicity if that person commits an offence by using that uniform.”¹²⁹

It might be understood from these examples that a state of blindness does not amount to intention, and is not sufficient grounds for convicting a person as an accessory. However, there is a need to discuss this kind of blindness situation, because of the serious effect it has in accessorial liability. Should the UAE follow the inappropriate view of Husni? We shall find out later in this chapter when discussing the necessity to reform the mens rea of accessorial liability.

(B) The coincidence of fault:

Some offences can only be committed with fault. These include manslaughter, causing injury by fault, and causing fire to property by fault. In these offences, the accused causes an undesired result prohibited by law. The forms of mens rea are negligence; inadvertence; carelessness; recklessness; imprudence or non-compliance with the provisions of the law, as an illustration of criminal fault adopted by the F.P.C., which is represented in two concepts; advertent fault, and inadvertent fault.

There is doubt whether coincidence of fault is a proper form of criminal complicity in Arab jurisdictions. There are, in fact, two schools of thought regarding this issue. The first group, supported by many commentators and decisions, indicates that there

¹²⁹ Husni, M., (Arabic. *Criminal Complicity*), *op. cit.*, p. 358.

is no room for fault in accessorial liability.¹³⁰ The second group insists that there is no reason for excluding criminal fault from this liability.¹³¹ The majority refuse to extend accessorial liability to cover fault offences where there is a coincidence between the parties. They insist that accessorial mens rea is only intention to participate in offences that can be committed intentionally. It might be true to say the idea behind this attitude is the nature of some forms of accessorial liability. This means that incitement and conspiracy require that the accused does the prohibited action with intention, which means that fault, is outside the state of mind in those two. By way of assistance, the legislator sometimes states in the F.P.C. and a number of other Arabic codes, 'providing assistance with knowledge that the things provided might be used in committing an offence.' The term knowledge is a metonym of the term intention, which means that fault, is outside accessorial's mens rea.

Another point is that the concept of fault offences does not require the accused to be the direct cause of the criminal result. It is enough to be one of the reasons of the result's occurrence. The legislator has defined these kinds of offences in broad terms, which means that a person who is involved in such a case would be a perpetrator rather than an accessory.

¹³⁰ Sidki, A., *Alwageez fee Alqanon Aljenai*, (Arabic. *Criminal Law*) (1986), Egypt: Dar Almarif. pp. 311, 355, 359; Hummad, A., *Alwaseet fee Sharh Qanon Algaza Al Kuwaiti: Alkesm Alam* (Arabic. *Explanation of Kuwait Penal Law: The General Part*) (3rd ed. 1983), Kuwait: Kuwait University Publication. pp. 204-205; Alojy, M., *Alqanon Aljenai Alam: Alguza Althani, Almasulia Aljenaia*, (Arabic. *Public Criminal Law: Part Two, Criminal Responsibility*) (2nd ed. 1992), Lebanon: Nofal Publication. p. 188; Alia, S., *Sharh Qanon Alokobat: Alkesm Alam* (Arabic. *Explanation of the Penal Code: The General Part*) (1998), Beirut. p. 328; Mahdi, A., *op cit.*, p. 356.

¹³¹ Husni, M., (Arabic. *Criminal Complicity*), *op. cit.*, pp. 366-367; Bhanam, R., *Alnadaria Alama le Alqanon Aljenai*, (Arabic. *The General Doctrine of Criminal Law*) (1995), Egypt: Almareaf

By contrast, a minority of commentators and a few cases insist that it is possible to say that criminal fault forms part of accessories mens rea when there exists a coincidence in the parties' state of mind. According to this view, complicity arises in fault offences where there is coincidence of mens rea between accomplices. That is to say that the mens rea of an accessory would be the contemplation of the consequence of the action, or a failure to contemplate that prohibited consequence, where a reasonable man would do so. For example, A gives his car to B, a person who is not a good driver. If B kills someone on the street then A is an accessory to manslaughter. Both have acted with fault and, according to this group, they are accomplices. The minority indicates that since the Code is silent about accessorial liability mens rea, fault cannot be excluded from complicity theory. It is enough to have coincidence of mens rea between the parties, and it is illogical to say that the accessory in fault offences can be charged as a perpetrator, because accessorial liability has less criminal role than a perpetrator's liability.

Reform

Under the F.P.C., there is doubt as to what accessorial mens rea requires, whether intention, fault or both. The F.P.C. and courts do not expressly declare which of these options to adopt. Further, the requirement of the coincidence of mens rea between accomplices is not expressly mentioned, which gives rise to further doubts and vagueness as to the proper understanding of the F.P.C. Moreover, in relation to the

Publication. p. 660; Sorrow, A., *op cit.*, p. 404-401, 456-458; Mustafa, M., *op cit.*, pp. 364-365; Rabia, H., *op cit.*, p. 434.

three forms of secondary participation mentioned in the F.P.C., incitement, conspiracy, and assistance, the F.P.C. implies that the first two forms can only be committed intentionally, although this is not stated expressly in the Code. A slight problem arises in assistance, which is a broad term, and can be interpreted to include knowledge within its meaning.¹³² Nevertheless, the current situation of accessorial liability needs urgent reform regarding the mens rea requirement. Having said that, this cannot be achieved unless, first, the requirement of mens rea, in relation to some forms of accessorial liability, is considered for reform by applying the notion of oblique intention. Consequently, the plan of this section is to examine the adequate mens rea of accessorial liability in the light of the F.P.C., and what the authorities in the UAE should do about it.

Accessory mens rea

The following paragraphs are devoted to an examination of the F.P.C. regarding accessorial mens rea. It is worth bearing in mind some previously stated facts, before proceeding to a direct examination the position of the matter in the UAE.

It has been pointed out above that the prosecution must establish the mental element of accessorial liability before charging accessories in respect of the principal crime. In addition, It was noted that the F.P.C. adopts two forms of mens rea: intention and fault. The majority opinion insists that there can be no indictment on grounds of

¹³² There is a strong view that although the legislation use the term *knowledge* in describing the form of assistance, as it is the case under the F.P.C., the original aim is to adopt intention as the required

accessorial liability unless the parties have the same mens rea relating to the offence in question. This is often called a 'coincidence of parties mens rea.' If such a state of mind is not proved, there will be separate charges.¹³³ Further, it was mentioned that the F.P.C. implicitly requires that an accessory must have the intention that the principal offender brings about the crime, which at the same time, suggests that accomplices often share the same intention stated in the definition of the offence. Intention in this regard is controlled by the general theory of criminal intention, which apparently has to be identical to the perpetrator's intention. Thus, under the current situation, accessorial intention is a wilful action compounded with the desire that the perpetrator bring about the prohibited result.

However, some leading Arabic legal commentators indicate that what has been said above is relevant for intentional crimes only. It means that since the requirement is the coincidence of mens rea, accessorial liability can be established if both the principal and accessory act in fault. This indicates that accessorial mens rea depends on the nature of the crime. Consequently if it is an intentional crime, the mens rea is intention, and if it is an offence of fault, the mens rea is fault. In both examples, the accomplices have to share the same mental element. The main reason for such a position is that since the Code is silent as regards mens rea, the concept of fault can be accommodated in accessorial liability because it acts in line with the requirement of 'coincidence of mens rea.' By contrast, it was noted that the majority of commentators refuse to extend accessorial liability to cover fault offences, where there is a coincidence of parties. They insist that accessorial mens rea is only

mens rea like the forms of encouragement and conspiracy. See: Sidky, A., *op. cit.*, p. 359.

constituted by intention to participate in offences that can be committed intentionally.

The required mens rea of criminal liability when the F.P.C. is vague:

An important question must be addressed at this stage: what is the situation when the F.P.C. is silent or in doubt regarding the mental element of any offence? A. Mahdi indicates that Arabic legal commentary confirms that, when the law is silent about the mental element in an offence, the required form of mens rea is intention, without its being expressly stated as such, while the form of fault needs to be explicitly stated.¹³⁴

However, this is not the case in the F.P.C. when the Code takes another approach.

Article (43) states that:

“An offender shall be responsible for a crime whether he has committed it with intention or fault, unless the law explicitly provides for intention.”

This is clearly interpreted as a departure from the above requirement of the Arabic legal commentary. The above article suggests that the Code must expressly state the form of intention, otherwise fault should be treated as the required mens rea of an offence. It is important to note that the F.P.C. in this connection acts in line with the 1989 English Draft Criminal Code, where it states in cl. 20. (1):

“Every offence requires a fault element of recklessness with respect to each of its elements other than fault elements, unless otherwise provided.”¹³⁵

¹³³ Mustafa, M., *op.cit.*, p. 364.

¹³⁴ Mahdi, A. *op. cit.* p. 200-222; Rabia, H., *op. cit.*, p. 279; Sorror, *op. cit.* p. 372; Al Shinaway, S., *Alnadaria Alama fee Algarema wal Alikab fee Qanon Alokobat Al Kuwaiti*, (Arabic. *The General Theory of Crime and Punishment in Kuwait Penal Code*) (2nd ed.1992). p. 753.

¹³⁵ English Draft Criminal Code 1989. See commentary in Vol. 2 p. 195 at p. 27.

Since the F.P.C. is silent regarding accessorial mens rea, does this suggest that fault is the minimum requirement of culpability?

This idea has not yet been addressed by other Arabic legal commentators. On the other hand, one might think that article (43), above, is a vital source from which to propose that the form of fault is the minimum requirement of accessorial mens rea. However, article (43) is rather ill structured. First of all, there is no clear reason why the F.P.C. in article (43) departs from the above requirement that intention is the normal form of mens rea and need not be explicitly stated, a point that is accepted by almost all Arabic jurists. Second, a careful examination of most articles of the F.P.C. suggests that the Code abandoned the application of article (43) in favour of the view of Arabic jurists. For example, crimes committed against property such as theft robbery, burglary, breach of trust, and fraud, are in fact very serious crimes, and the F.P.C. does not expressly state that intention is the required form of mens rea. Does this suggest that those crimes can be committed with fault? In fact, the answer must be in the negative, because the nature of these crimes does not allow such an approach, and it is difficult to see a court accepting this approach. This promotes one to suggest that the application of article (43) is misleading and should not affect the position of mens rea when dealing with accessorial liability whether regarding the current or the appropriate conception.

Consequently, another question establishes itself. What is the required accessorial mens rea under the F.P.C.?

The answer to this is that criminal intention is the required mens rea whatever the offence is. This conclusion leads us to discuss three important topics:

- 1- what should constitute intention under accessorial liability.
- 2- the essence of accessorial liability.
- 3- why must intention be the required mens rea, regardless of the mens rea of the principal offender.

(1) What should constitute intention under accessorial liability:

It must be emphasised that the following discussions examine oblique intention as a general concept. However, since our concern is the liability of accessories, I believe that this notion of intention should be adopted in deciding the required mens rea of such liability. A discussion of oblique intention of the liability of the principal is beyond this study.

It was earlier indicated that direct intention is clearly connected to purpose. Arabic legal commentators call this *first degree purpose* and move further from this strict nature of criminal intent to another form called *second degree purpose*, where the offender's original purpose is to bring about result (A) but his action will inevitably cause another result (B). (This is interpreted as oblique intent under the English Draft Criminal Code). Consequently, such a form cannot stand on its own, as it has to be based on desiring a criminal purpose in the first place. An obvious example is that in which the offender wishes to bomb a cargo aeroplane intending to damage the plane in order to claim under an insurance policy. The *first degree purpose* is to damage the plane; the *second degree purpose* is that of killing the passengers or the crew. However, in a situation where a person only contemplates that a criminal result will certainly follow from his voluntary action, under Arabic jurisprudence this will be

considered as merely an instance of gross fault or subjective recklessness as it is understood in English law.

The question is why should this not be considered as oblique intention, or merely as evidence of intention. Such a high degree of contemplation probably should be judged separately from fault and intention, or should be considered as intention or evidence of intention, but should not be categorised within the concept of fault. For instance the American Model Penal Code (M.P.C.) treats this notion as separate form of culpability. Thus under the M.P.C. mens rea is established in three forms: purpose; knowledge; and recklessness. Section 202 (2) (b) indicates that:

“A person acts knowingly with respect to material element of an offence when...(ii) if the element involves a result of this conduct, he is aware that it is practically certain that this conduct will cause such a result.”¹³⁶

In this regard, it must be said that since the appropriate accessorial mens rea under the F.P.C. is intention, adopting the above form of the M.P.C. in the concept of criminal intention will have the ability of encapsulating many activities which probably now are outside the net of accessorial liability. For example, a person who lawfully sells guns and knows that his customer will certainly use one in committing an offence, might not be considered as an accessory if the prosecution cannot show that he wanted the principal offender to commit the offence.

One might argue that ‘oblique intent’ should be applied to the prevalent view in Arabic legal commentary. However, given that ‘oblique intention’ in Arabic

¹³⁶ Clarkson C. Keating, H., *Criminal Law: Texts and Materials* (4th ed. 1998), London: Sweet & Maxwell. p. 152.

jurisprudence is a very controversial and confusing issue, the classification of intention or purpose into *first degree purpose* and *second degree purpose* being a result of such conflict, this source does not provide the best solution. Further, it must be emphasised that the opinions of Arabic legal commentators do not have binding effect; were this to be so, it would confine UAE criminal law to an unacceptable extent. UAE criminal law being formed from a variety of sources, a move away from regional views should be made without any pressure from such indefensible restrictions, retaining only that which merits retention.

In addition, it was indicated that there are two schools of thought regarding oblique intention. Neither provides an accurate or proper solution to the problem. The less convincing is the first school which demolishes the boundaries of criminal intention and brings much uncertainty to the issue by indicating that when an offender intends to bring about a particular result and a more serious result occurs he will be responsible for it, even though he did not contemplate the end result. This is justified by indicating that an offender must first harbour the purpose of causing a criminal result (A) and as consequence of this action, another result (B) occurs. The offender, thus, is responsible, on objective proof of the reasonable man test, for result (B). This is called an oblique intent, indicating that it is an exceptional form, and as such, it needs to be expressly stated in specific articles of penal codes.¹³⁷

This interpretation of the first school is not totally convincing and leaves one uncertain as to the proper aspect of oblique intent. Having said that, this is not to

defend the opinion of the second school, which also has its drawbacks. Oblique intention according to this school means that the offender does not need to contemplate that the result will certainly happen, but rather that either a probable or possible result will flow from his voluntary action. However, the offender must accept the possible occurrence of such a result, otherwise such contemplation is classified as gross fault.¹³⁷ Proponents of this school indicate that this type of intention is an independent form of purpose, which is a class in its own without any need for express provision. It was argued that this does not involve anything new because desiring or accepting a result as being likely to happen amounts to the same thing, which means that the offender wants the prohibited result or consequence to occur. I believe that the degree of contemplation should not be important or relevant simply because both desire and acceptance of a result can be called purpose, the only difference being how strong such a purpose is (only to decide the appropriate punishment.)

A. Sidky indicates that the efforts of legal commentary regarding the distinction between direct and oblique intent have not provided an answer to the problem. He thinks that this is a normal situation because such a problem should be solved by the courts in examining criminal cases, where the facts of each case provide the opportunity for proper examination. Accordingly, he indicates that since the legislation does not provide a direct answer to such a distinction, the criminal courts

¹³⁷ See the summary of those opinions in Husni, M., (Arabic. *Criminal Intention*) *op. cit.*, pp. 281-285.

¹³⁸ *ibid.* p. 294

have to examine and evaluate the notion of oblique intent, which should be determined subjectively.¹³⁹

Sidky's view is reasonable in its general outline. However, he fails to deal with some important points. First, oddly under Arabic jurisprudence, the role of legal commentary is much more important than the view of the judiciary, which causes another odd outcome by leading to reliance on outsiders who do not work within the reality of distinctive customs and culture of other countries, especially countries such as the UAE. Second, it must be understood that judges are unwilling to act so as to create a new legal principle, which is, rather, the task of the legislature. Even where the law grants such an opportunity, the judiciary, especially in the UAE, will probably rather take its cue from another Arabic country, particularly Egypt. In this case, however, the Egyptian judiciary has not provided a united solution to the problem. Therefore, it must be said that the best answer in relation to the issue of criminal intention is to be provided directly and expressly by the Code, which needs amendment to solve the problem. This brings us to another question: what should the Code state about oblique intent in relation to accessorial liability?

Before answering this, one might turn to a leading commentator, R. Bhanam, who asks a very simple question: what distinguishes intention from other forms of mens rea?¹⁴⁰ He points out that direct intention is related to the notion of purpose, but this is what intention contains. In fact, there is a middle position between criminal

¹³⁹ Sidky, A., *op. cit.*, p. 326.

¹⁴⁰ Bhanam, R., *Alnadaria Alama le Alqanon Aljenai*, (Arabic. *The General Doctrine of Criminal Law*) (1995), Egypt: Almareaf Publication. pp. 751-5.

intention and fault (recklessness) for a voluntary action which is performed with knowledge or contemplation of a virtually certain or probable consequence. Unlike other Arabic commentators, Bhanam points that this form is called indirect intention, which amounts to what it is understood as oblique intention.

Bhanam's view is not shared by other legal commentators and comes to a similar position to that of English case law before *Woollin* (1998), except in two respects. Firstly, Bhanam's views put this type of mens rea into a special class behind purpose and ahead of subjective fault and suggest that it stands on its own, as a form of intention and not merely an evidence of purpose (in the same way as does the English Draft Criminal Code in cl. 18). Secondly, the level of contemplation of the voluntary action is either that the result will occur (virtual certainty) or that might occur (probability) but if the result is merely possible, it is only governed by subjective fault.

Bhanam's opinions are weighty, but some points need to be discussed. According to Bhanam, when the result is probably going to occur the intent in question is indirect. However, this combines subjective fault with indirect intent, which is not a widely held position and it would result in conflict and disharmony between the two forms of mens rea. Perhaps it would have been preferable if he had linked a higher degree of contemplation such as virtual or practical certainty with this notion of mens rea. Such a suggestion would not acknowledge the existence of problems in examining oblique intention from the point of view of the degree of knowledge or contemplation, but would emphasise, rather, that the degree of knowledge should be

decided by examining all the evidence and inferring the degree of knowledge in each case, which should be separate from intention and fault.

The F.P.C. should use either the view of the American M.P.C. which distinguishes knowledge of virtual certainty from other forms of mens rea and call it 'knowledge' or cl. 18 of the English Draft Criminal Code which treats knowledge of virtual certainty as an oblique intention apart from purpose, or adopt the use of *virtual, practical certainty* used in the English case law as an evidence of purpose. This type of intention should be the required mens rea, with purpose, in relation to the accessorial forms of instigation and assistance, or at least regarding the form of assistance. By contrast, conspiracy should require only purpose. The above opinions of oblique intention are much preferable to the two Arabic schools of thought.¹⁴¹ The F.P.C. is vague in relation to oblique intention, and this perhaps brings an opportunity to adopt either of the above, in relation to accessorial liability, but only when the F.P.C. is amended. Under the current situation intention means *first degree purpose* and *second degree purpose*, as previously mentioned.

It is important to remind oneself that there are problems in applying the test of knowledge of virtual certainty to criminal intention, especially when distinguishing this from the notion of subjective recklessness. The important question would be: how can a court determine whether a defendant contemplated a result as virtually or practically certain or as having no substantial doubt that the result will occur? Even in applying the knowledge of probabilities, as an oblique intention, there would be

some difficulties in determining the degree of contemplation. In this connection, Glanville Williams writes that:

“There is no agreed mathematical translation of ‘probable,’ and all we can say about ‘likely’ is that it may cover lower degree of probability than ‘probable’ (although dictionaries make them both the same). In statistics, probability means the whole range of possibility between impossibility and certainty (in mathematical terms, between naught and one)... Even if there were an Act of Parliament saying that probability in law means a probability of (say) 51 or more, the jury would have great difficulty in adjudicating the issue unless evidence were presented of elaborate experiments to determine the probability.”¹⁴²

However, he supports knowledge of virtual certainty, when he states that:

“Clearly, one cannot confine the notion of foresight of certainty to certainty in the most absolute sense. It is a question of human certainty, virtual certainty, or practical certainty. This is still not the same as speaking in terms of probability.”¹⁴³

The above view suggests that where virtual or practical certainty or having no substantial doubt exists, the matter should be treated as oblique intent. Surprisingly, Williams does not agree with this when dealing, in particular, with accessorial liability. Rather he propounds a justification for requiring intention to act and knowledge of the consequences, something that has not expressly been examined by English case law.

On the other hand if it is accepted that contemplation of a result as virtually certain to occur, based on inferences from all the evidence presented to the court, constitutes oblique intent, this would cause some confusion with the normal definition of the term. The reason for this is that it does not actually constitute intention itself

¹⁴¹ See the situation of oblique intention under English law at the beginning of this chapter.

¹⁴² Williams, G., *TBCL*, (1st ed. 1978) *op. cit.*, pp. 215-216.

¹⁴³ Williams, G., *TBCL*, (2nd ed. 1983) *op. cit.*, p. 85.

(purpose), nor a subjective fault or recklessness. It is merely a class in itself and need to be expressly indicated, which follows the same approach of the American M.P.C. and the English Draft Criminal Code.

Many discussions of criminal complicity play a central role in the writings of legal commentators, but since they alone do not decide the matter, other principles need to be invoked. For example, should intention, regarding accessorial liability, be judged differently from the general theory? In other words, should intention here, be based only on the notion of wanting the offence to occur?

It has been noted that criminal intention has a very narrow meaning, based on 'purpose', and there is no mention of oblique intent under the F.P.C. Likewise, it was suggested that knowledge of virtual certainty should be treated, at least from an evidential point of view, as evidence of intention, until the Code is amended. However, such a restrictive approach might lead some culpable accessories to escape the net of accessorial liability. A clear example of this is where a person provides help not with aim that the principal should commit the crime but in order to facilitate its commission. The person in this example is indifferent whether the primary crime is committed or not. Under the current situation of the F.P.C. the prosecution has to prove that the accessory wanted the crime to occur, which by the same token, indicates that intention to facilitate the crime is probably not sufficient for incrimination. In a point of fact, such a thing is inappropriate and causes some problems for the prosecution. There is no reason why the Code should not include facilitative purpose with the meaning of intention in all accessorial forms. Indeed, the

F.P.C. has adopted such a term, regarding accessorial liability as an offence against the external security of the State, as in article (171) and some other offences.¹⁴⁴

To conclude, the amendment of the F.P.C. should concentrate on developing the concept of oblique intention in relation to accessorial liability. This should take either the position of the American M.P.C. or that of English law. Until such an amendment occurs, the UAE courts should take note that there is a problem relating the requirements of intention in accessorial liability, which is currently connected to purpose. A positive step is needed, which suggests that the courts should treat knowledge of virtual certainty, especially regarding accessorial liability, as evidence of intention. One might argue that this cannot be accomplished in a codified legal system because case law is not a source of law. Certainly, this does not suggest giving the courts a legislative power, but the proposed function of the court here is merely an interpretative one; this can include the development of a concept within the subjective criteria of criminal guilt, a matter which could be under the control and restriction of F.S.C. of the UAE and the Dubai Cassation Court. One interpretative source is legal commentary, which now does not follow such approach. However, interpretation should not be bound by legal commentary, it should concentrate on the

¹⁴⁴ An example of this under the F.P.C. are:

Article (150): "A death penalty shall be imposed on...B) any one who, at the time of war, instigate soldiers to join the service of any foreign state or facilitate such an action."; Article (187): "A death penalty or life imprisonment shall be imposed upon any person who commands an armed gang, takes the gang charge, or manages its movement; system for the purpose of capturing, plundering territories, or properties owned by the State or any group of people, or for the purpose of resisting the military force ordered to capture the offenders of these crimes. Other members of such a gang shall be punished by temporary imprisonment."; Article (188): "Life or temporary imprisonment shall be imposed upon any person who knowingly supplies or give the gang mentioned in previous article [article 187] weapons, tools, equipment, tools to help them in reaching their aim, sends them aid, raise funds for them, or involves in any kind of criminal communication with the leaders or directors of the gang, or by knowing their aim and character provides them with houses or places of meetings."

subjective nature of intention and bring a higher degree of knowledge close to the requirement of intention, especially in accessory liability. It is important to mention that this does not constitute an overlap of the concept of gross fault with purpose, it is merely a suggestion that gross fault or, in other words, knowledge of virtual certainty should be treated as evidence of intention, which is, in fact, a matter of evidential procedures until the Code is amended to expressly indicate that such state of mind is of a class in itself. Moreover, the above suggestion will not infringe any rule of law because it does not declare that knowledge of virtual certainty (gross fault) is an intention in itself, but merely an evidence of intention, which helps in clearing the vagueness of this part in accessory liability. R. Youngs correctly indicates that even in codified legal systems the codes need to be interpreted, developed and supplemented because the drafters cannot consider every possible situation that an article might govern.¹⁴⁵ It is wrong to imagine that any code does not need interpretation.¹⁴⁶ Perhaps the only problem is that such a suggestion would not be accepted by the majority of Arabic legal commentators, which might lead judges and prosecution to refuse the proposal. However, considering the fact that the above proposal is based on subjective criteria and an evidential standard, judges should adopt the proposal because it gives the power to control crime in the case of accessory liability; otherwise, it will allow many offenders to escape criminal responsibility because of the narrow and restricted meaning of criminal intention

¹⁴⁵ Youngs, R., *English, French & German Comparative Law* (1998), London: Cavendish Publishing Limited. p. 50.

¹⁴⁶ For example, during the time of Frederick of Prussia the Prussian Land Code contained about 17,000 clauses and was intended to help lawyers but even legislation on this massive scale cannot be applied in purely mechanical way. *ibid.* p. 44.

under the F.P.C. A supportive view of this comes from Judge Hassan Kera, the previous Head of the Dubai Cassation Court. He said:

“The Cassation Court is a court of law, seeks to supervise the application and the unity of interpreting the law...For interpretation, the court shall not be bound by written articles, even old ones because its function is to clear and moderate the law to accommodate the application of new theories in society.”¹⁴⁷

(2) The essence of accessorial liability:

Two important matters need careful examination under this heading. The first of these is an understanding of the essence of accessorial liability according to legal commentary and in terms of the actual situation. Second, there is the issue as to whether consensus on a legal subject is desirable in terms of arguments concerned with Arabic legal unity.

a) Understanding of the essence of accessorial liability in legal commentary and the actual situation:

In Arabic legal commentary, regarding the issue of mens rea, there is consensus that accomplices must have something called *mental connection*, an Arabic legal term, used to link their guilt jointly under the doctrine of criminal complicity; if such connection is not established their guilt is judged separately. For example H. Rabia, indicates:

¹⁴⁷ Kera, H., “Muqdimah”, *Majallat Alqda wa Altashria* (Arabic. “Introduction” (January 1993) *Court & Legislation Journal* pp. 6-7. There is no clear evidence of putting the above view into practice by the Dubai Cassation Court. Thus one ought to question whether Dr. H. Kera really believes that his above statement should be enforced in the UAE or is it just a repeating of what had been delivered by the French Cassation Court? Compare the decisions of *Cour de Cassation, Report annuel 1975* (Paris, 1976) 101, and *Rapport de la Cour de Cassation: Annees judiciaires 1976 et 1977* (Paris, 1978) 119, cited in Bell, J. Boyron, S. & Whittaker, S., *Principles of French Law* (1998), Oxford: Oxford University Press. pp. 26-9.

“The material element (causation) is not enough to establish criminal complicity. Yet, there must be a sort of *mental connection* to combine accomplices under one criminal enterprise. There is a unanimity that such mental connection must exist, but what constitutes it is under debate.”¹⁴⁸

It has been pointed out above that the principle of the coincidence of accomplices' mens rea was divided into the following: coincidence of intention; and coincidence of fault. Further, It has been argued that the latter is not appropriate in deciding the mental element in accessorial liability, and I pointed out that many commentators approved the first. Such commentary indicates that the principle of coincidence demands that an accessory must have the intention that the principal commits a crime, thus, all accomplices must share the same intention as stated in the definition of the offence. Accordingly lack of joint intention or, in other words, *mental connection* means each must be judged on separate liability because such joint intention, under their view, is the essence of complicity. It has already been mentioned that, in the past, the view was that *mental connection* must require some sort of conspiracy: agreement or tacit understanding. One might think that such a view points to the requirement that accomplices must know each other, discuss the crime, and apportion their roles. This may have been the view in the past; commentators from the 1950's onwards tried to move *mental connection* from the above view to one in which the accessory only must know that the principal is to commit or is committing the offence and must share that intention with the principal, regardless of whether he knows of the accessory's participation.¹⁴⁹ Thus, the accessory's knowledge is the only important issue when speaking in terms of

¹⁴⁸ Rabia, H., *op. cit.*, p. 371.

¹⁴⁹ Husni, M., (Arabic. *Criminal Complicity*), *op. cit.*, p. 28..

knowledge between the parties, which at the same time suggests there is no need to establish on the part of the principal knowledge of the activities of accessory parties.

One might argue that the move from the old view was due to its narrowness and undue restriction which prevented the extension of the net of criminal complicity. This may be true, but two points raise some doubts as to this analysis. First it might be possible to state that those who instigated and advocated the move are the commentators who supported applying fault in complicity, and because fault does not encompass agreement, they might favour abandoning the requirements for agreement, even in its tacit form, in deciding the required *mental connection*. Having said that, those who suggested intention alone is sufficient as the required mens rea, have taken the same view that knowledge is only important to the accessory; accomplices must have joint intention but it is not necessary that the principal has knowledge of the accessory. This brings more controversy to the issue. Second, if the basis of such a move is linked to the accessory's willingness to participate in the principal's crime, it would be very strange to suggest that they must share intention. In fact, this would bring us back to the starting point, that there should be some sort of knowledge between the principal and the accessory in deciding the required *mental connection*. Many have indicated that this is not needed. For instance, H. Rabia summarises the view of Arabic legal commentary by indicating that:

"The correct view presumes that the *mental connection* in intentional crime requires that there must be a joint criminal intention. Such a thing requires each accomplice must have *intention to intervene* compound with knowledge of the action of the other parties...There is no necessity that the principal offender must know or even accept the actions of co-principals or

accessories. What is required is that the accessory must have knowledge of the actions of the principal offender and intend to intervene.”¹⁵⁰

Instead of linking the *mental connection* to the concept of knowledge or willingness, sharing the same mens rea with the principal is the current description favoured by legal commentary. The direct effect of this approach is that instead of focussing on the accessory’s willingness to participate, a groundless requirement of joint intention is required. (One might think that since there is an agreement between commentators over this, then this should be classified as an authority. It should not.) In fact, in most cases, accomplices act with a similar state of mind, in other words, with joint intention. However, should this suggest that joint intention is the essence of our discussion? If so, what are the grounds for this? In fact, not only common sense suggests that there is a serious misunderstanding in deciding the *mental connection*, there is also no great need to establish joint intention. The primary difficulty lies in the scope of joint intention, which requires establishing that knowledge or at least a tacit agreement exists between the parties, and this is not required according to legal commentary.

Yussar A. Ali indicates:

“The *mental connection* in criminal complicity... requires two important elements. First the awareness of the accomplice of the activities of other accomplices, ... Second, the willingness to engage or incorporate in the committing of the crime.”¹⁵¹

¹⁵⁰ Rabia, H., *op. cit.*, pp. 373-375.

¹⁵¹ Ali, Y.A., *Sharh Qanon Alokobat: Alnadariat Alama, Alkitab Althani*, (Arabic. *Explanation of the Penal Code: The General Theories, Book Two*) (1987), Egypt: Dar Alnhda Alarabia. p. 10.

This view confirms the situation wherein willingness to participate must be treated as the essence of accessorial liability and as representing the reality of the situation. Unfortunately, Yussar A. Ali departs from his earlier argument when he indicates:

“The willingness to participate means ‘*joint intention*’ or in other words ‘*intention to intervene*’ Without this there would not be a total unity between accomplices in achieving their goal.”¹⁵²

In departing from his earlier view, Yussar Ali defines willingness to participate as including ‘*joint intention*’ or ‘*intention to intervene*’. Strangely, he uses both terms to mean similarity of mens rea between the parties, which confirms that he believes that joint state of mind, whether in intention, or fault, is the essence without which no criminal complicity exists. However, he declines to offer any reason for departing from the earlier statement, which implies that there is some misunderstanding of the essence of accessorial liability in Arabic legal commentary.

Using the term ‘*intention to intervene*’ refers to the accessorial state of mind and does not mean ‘*joint intention*’ because the terms differ in relation to knowledge. Logically the first focuses only on the accessory’s state of mind and insists that there is no need to establish knowledge between the parties, (the current view accepted by legal commentators although they do not declare that willingness is the essence). ‘*Joint intention*’, on the other hand, stresses that knowledge is essential and that the prosecution must establish such a link. It should be noted that M. Husni confirms this by insisting that ‘*intention to intervene*’ just brings controversy and does not provide the best answer to the problem and thus should not be used as a term in this

¹⁵² *ibid.* p. 11; Sorror., *op. cit.*, p. 403.

connection. He notes that the above term tends to the conclusion that fault is not within the definition of accessorial mens rea, while he thinks it is, and, unlike other commentators, he does not use the above term. Instead, Husni uses '*joint intention*' intending it to be understood as the essence of criminal complicity.

One might wonder why there is such misunderstanding of the essence of accessorial liability. Presumably, the requirement of joint intention is a consequence of the derivative nature of accessorial liability, in that liability is incurred only where the principal has committed, or at least attempted to commit, an offence. A strict interpretation of this would suggest that, since accessorial liability depends on the liability of the principal, accomplices should be charged and convicted of the same crime and generally the same punishment. Joint state of mind serves such a purpose, without which would exist an odd situation contrary to the notion of secondary involvement, which derives its criminality from the committal of the principal offence. An example of this is where A instigates a driver, P, to speed with the aim that P should kill a pedestrian, which he does by fault. A might be liable for murder or attempted murder, and P might be liable for manslaughter or assault. According to the above orthodox view the derivative nature of accessorial liability would only link A to manslaughter and this cannot be achieved because of the odd requirement of joint intention. Otherwise A's liability must be judged separately from complicity.

Should I confirm that the derivative nature is the reason behind the requirement of joint state of mind? It must be said that those who advocate using the term '*joint intention*' do not expressly advocate the above view. It is only implicit within their

attempt to find the hidden foundation to establish joint intention as the essence of the subject. This raises the question as to whether accessories can be convicted of a more serious crime than the principal offender. In the above example, the question is whether A should be charged and convicted of murder separately or as an accessory, assuming that P's crime is only manslaughter. It is a new question and there is no serious discussion of this except in general terms. However, M. Husni rejects the notion that A and P should be judged according to the doctrine of criminal complicity. He says:

“When the actions of the principal is not serious his liability should not be serious, and this leads to say that the actions of accessory should be the same... The accessory is responsible for what has been committed not for what he wants to be committed. If the accessory intends a serious crime and the principal commits less serious crime, the accessory is responsible for the less serious because it (the principal crime) is the basis of his liability.”¹⁵³

Thus, although not expressly stated by Husni, joint intention is required because of the derivative nature of criminal complicity. This view is, however, not universal . For example, A. Mahdi, while endorsing the joint intention approach, indicates that, in the above example, A and P are accomplices but that A is liable for murder or attempted murder, P is liable for manslaughter or assault according to the criminal complicity.¹⁵⁴ Likewise A. Sorrow indicates that the derivative nature of criminal complicity does not remove the requirement to distinguish the guilt of accomplices according to their state of mind relating to the crime that was committed. He says that:

“The Egyptian legislation favours a limited version of the derivative theory of complicity...This brings into attention four presumptive examples: ... Second, ‘intention and fault’ an accessory can act intentionally in a crime that

¹⁵³ Husni, M., (Arabic. *Criminal Complicity*) *op.cit.*, pp. 447-8.

¹⁵⁴ Mahdi, A., *op.cit.*, p. 393.

the principal commits with fault. An example of this is when a nurse puts poison in a bottle, which another gives to a patient recklessly, and causes his death. The nurse is liable for being an accessory to murder while the principal is responsible for manslaughter because complicity arises from the intention of the nurse to engage or contribute in homicide. This acts in line with applying limited sense of the derivative theory. Joint intention is only required when the principal acts intentionally”¹⁵⁵

The existence of divided opinions regarding the matter suggests that there is room for arguing that accessories may be convicted of more serious crimes than the principal. There is no clear statement as to the reaction of the UAE courts to the above debate, although, the F.P.C. probably endorses Sorrow’s view, indicating in article (52) that:

“If the classification of a crime or penalty changes in relation to the intent of an offender or as a result of his knowledge, an accomplice whether principal or accessory to the crime shall be punished in accordance with his intent or knowledge.”

Presumably, this article runs contrary to the application of the principle of the coincidence of mens rea, in relation to joint intention. It indicates that accomplices could have a separate mens rea from the principal, in relation to the one offence. However, someone might argue that this article is relevant only in circumstances that can intensify or reduce the punishment, which have to be related to one crime only. For example, in the case of murder, under the F.P.C. the mens rea can be of differing degrees, namely, simple intention; intention compounded by plotting in advance; intention compounded by premeditation; using poisonous or detonating substances. Thus, without changing the charge, the accomplices can be convicted and subjected to more serious punishment, depending only on their knowledge of some aggravating circumstances as in above example. However, the effect and the language of article

¹⁵⁵ Sorrow, A., *op.cit.*, pp. 474-5; Bhanam, R., (1995) *op.cit.*, pp. 690-1.

52, suggest the opposite, which presumably proposes that accessories can be liable for more serious crimes than the principal (to remove any uncertainty concerning such matter, UAE should clarify the law at this point).

Consequently, it is safe to say that the depiction of joint intention as the essence of criminal complicity both lacks logic and runs counter to criminal law policy. From the above examination, I conclude that the pure essence of criminal complicity lies in the accessory's willingness to contribute to the offence of the principal offender, based on his intention to participate. The essence of the subject can be extended if the proposed definition of oblique intention is accepted as including both willingness and a high degree of knowledge of a crime. This provides a strong foundation based on issues related to the accessory only, from the language of the F.P.C. and the understandings of legal commentary. Declaring that intention to participate, in other words, willingness, is the essence of accessorial liability enables the courts to direct their efforts so as to deal with certain activities which otherwise might remain outside the net of criminal complicity. For example, the doctrine of innocent agency treats an accessory as a principal offender if he uses an innocent person to commit a crime. Thus, the principal here would not be punished because of the lack of a relevant mental state, where the principal acts with fault and the accessory with intention, under the joint intention approach, the accessory is neither principal, under the concept of innocent agency, nor an accessory and his liability should be located elsewhere. Yet, if it is not possible to find or locate a set of rules to punish such an offender, he or she might escape on otherwise justified conviction. This might be justifiable under a joint intention basis but not under the willingness/knowledge

approach, which would treat a person in such circumstances as an accessory where the doctrine of innocent agency would fail so to do so. Some commentators may justify their approach to include fault in criminal complicity by insisting, wrongly, on joint state of mind as the essence of the *mental connection* required between accomplices.

Should the UAE courts adopt our view of the *mental connection*? The court taking a common sense approach can interpret the essence of liability as the accessory's willingness to participate, or his high degree of knowledge that the principal will commit an offence, if the latter is enacted or approved. This approach is based on analogy, comparison, interpretation of the F.P.C., and commentary, although admitting it currently lacks support. Although it might be hoped that the courts will consider this view, there are reasons for UAE courts to cling to the principle of coincidence of mens rea. It is likely that the courts will apply joint intention as the essential element in deciding the *mental connection* between accomplices. This can be justified in examples where accomplices share joint intention, although willingness is still the essence. There remain, then, several vague areas, as a result of the following factors: first, accessorial liability is a closed subject and many presume that the issue is clear and settled, which in fact is not. Second, foreign judges do not investigate the reality of the issue under the UAE criminal system, either because of their link to their own legal culture or because of a lack of materials which are directly relevant to UAE criminal law. Even recent books dealing with criminal law fail to investigate the F.P.C. and the local criminal codes directly. Instead the authors

make use of links to their own legal culture, thinking that Arabic legal discussion must take place within a structure of 'legal unity.'

b) Must 'unanimity or consensus' of Arabic legal commentary be considered as part of interpretation the F.P.C.?

Regarding the issue of mens rea, the issue cannot be dealt with cursorily merely because there is an indication from the legal commentators that there is unanimity or consensus that accomplices must have a joint state of mind. There is clear pressure on jurists to retract their views of what is and what should be the law within the confines of Arabic legal commentary, based on 'unanimity or consensus.' However, these terms are vague and controversial and might be viewed as somewhat exclusive. So, why is it that those terms lead many to think of a legal unity existing between Arab States especially those in the Middle East?

Before discussing this claim, two important issues must be mentioned. First, any interpretative measure should concentrate on the wording of the F.P.C. regarding the issue of accessory liability. This suggests that what has been said in legal commentary is inappropriate in relation to the 'coincidence of parties' mens rea whether by intention or fault. Some might argue that when there is vagueness regarding an issue, the view preferred in legal commentary should be adopted. This could be valid in many fields of law, but any proposal relating to criminal law must be approached with caution, because criminal liability carries such significant penalties, and is considered so crucial to rights and liberties. An analysis of the language of the F.P.C. must be the first step in any interpretation. This is not to

suggest that the role of legal commentary be restricted, but it provides a clear basis from which to consider the issue of accessory mens rea. It was pointed out that there are two schools of thought regarding this issue. Both agree as to the adoption of the principle of 'coincidence of parties' mens rea', but differ in what should be the minimum form of mental element. It is not known which view the drafters of the F.P.C. adopted, or even considered. In addition, it would be problematic to suggest that the Code adopted the principle of 'coincidence of parties' mens rea', given that there is nothing in the F.P.C. to suggest this, even though it was possibly copied from the code of another country, which does apply such a principle. Secondly, one might argue that Arabic law shares a considerable unity, and this should be borne in mind in therefore any interpretative measurement, particularly in relation to Egyptian legal commentators. However, this would be inaccurate, because there is no such tie as exists between common law countries where a case in country A can be often applied easily in country B. If this has been the case in Arabic countries, why should the Government of the UAE have set up a committee charged with drafting a criminal code? It would have been simpler to select, for example, the Egyptian Penal Code as a model and to introduce it in the UAE. Presuming an identity of legal interest ignores the fact that countries differ from one another in many respects and the law cannot ignore this. For example, the UAE has achieved a higher state of financial development than most other Arabic States, and to suggest that the UAE adopt financial laws of countries less developed in this respect would be inappropriate. A further example is that in 1997 the legislature in the UAE drafted a Code of Money Laundering, which was totally based on the recommendation of the Financial Action

Task Force (FATF).¹⁵⁶ The Egyptians are debating whether to draft such a code, yet, if both codes were to be issued, it would not be necessarily helpful to analyse the issue of money laundering in one country in relation to the other's code.¹⁵⁷

It might be asked why legal issues should be addressed domestically. There is strong view, shared by many, that, contrary to other systems, one must always assume a high degree of unity within Arabic legal systems. A possible reason for this might be based on *Arabic Nationalism*, and yet here what ties do exist are declining and might be restricted to political rather than legal goals. Thus, a conclusion of legal unity is likely to be misleading, and simply wrong. For example, Enid Hill indicates:

“Middle Eastern law is not a unity, nor has it ever been. Each modern Middle Eastern State has its own legal system. Therefore, Middle Eastern law cannot be assumed to be a unity for the purpose of comparison. Given the differences existing among Western legal systems, this statement is any thing but remarkable. What is remarkable, however, is how frequently the Middle East is *assumed* to be a legal unity.”¹⁵⁸

¹⁵⁶ The Draft Code of UAE Money Laundering is still an unofficial document because the Ministry of Justice and Islamic Affairs is still discussing the ambit of the code and how strong it should be to surround laundering crimes. Presumably, the UAE in this connection is the first Arabic country to draft such a code. However, money laundering is a controversial concept and linked to seize the proceeds of any crime, which the draft code seeks to accomplish, but this is very difficult to achieve because there is a strong debate about the proper definition of money laundering and how should be applied by the domestic laws. Many countries are restricting the application of money laundering to drug trafficking because it is one of a few crimes on which all countries of the world agree on. Thus one wonders what will happen if such a code is passed but cannot operate because of the vagueness that shadows the definition of money laundering. It has been said that ‘to pass a law and not have it enforced is to authorise the very thing you wish to prohibit.’ Cardinal Richelieu, “Memories”, in Edwin Moore., *Collins GEM: Quotations* (3rd ed. 1999), Harper Collins Publisher. p. 232.

¹⁵⁷ <http://www.albayan.co.ae/albayan/1999/04/07/sya/5.html>. [Arabic].

¹⁵⁸ Hill, E., “Comparative and Historical Study of Modern Middle Eastern Law” (1978) 26 *American Journal of Comparative Law* 279. at p. 284. The author was an associate professor of political science at the American University in Cairo in early 70's. It is worth mentioning that there is no general agreement regarding the definition of ‘Middle East’, the author classified it as ‘those areas that owe their Middle Eastern character to historical culture *cum* religious identification rather than geography.’ Hill, E., *ibid.* p. 290 at note 42.

In confirmation of this, Hill reports a story about the Egyptian Civil Code that might challenge any claim of legal unity:

“The problem of interpreting laws was of manageable proportions when adopted codes were taken from a single source. The eclecticism of recently-adopted civil code however has raised problems of interpretation. The Egyptian Code (Civil Code) of 1948 required jurists to refer to twenty odd foreign codes for the understanding of the historical source of a rule...Dr Sanhuri, architect and chief interpreter of the ‘eclectic’ Egyptian code, has said that since the rules were formulated to be consistent with the Egyptian environment and usage...they were divorced from their sources and acquired an independent existence.”¹⁵⁹

This is a compelling statement based on the fact that every country has its own political, economical, and social system, which differs from one state to another. Accordingly, one must take seriously the statement of Professor Abdalrazzaq Al-Sanhuri, a well known jurist, that legal texts should be founded on national standards, and not suffer compulsory interpretation from any legal commentators or from any other Arabic legal system. Such a matter has to be optional and not obligatory.

¹⁵⁹ *ibid.* p. 289. The author’s original reference to this is a conversation between Al-Sanhuri and Farhat Ziadeh, cited in Ziadeh, F., *Lawyers, the Rule of Law, and Liberalism in Modern Egypt* (1968), Hoover Institution: Stanford California. pp. 144-6. It must be said that although Al-Sanhuri tried to build an identity for Egyptian law, others, who were the majority, favoured mimicking foreign legal systems without thinking about the consequences on their culture especially in criminal law. For example, Tewfik Al-Hakim, a famous Egyptian playwright and novelist, wrote a novel criticising the alien character of French law and its application to the Egyptian peasants who were supposed to understand and know the Napoleonic Code. Al-Hakim., *The Maze of Justice*, trans. Eban (1947) cited in Hill, E., *op. cit.*, p. 290 at note 45.

(3) Why must intention be the required mens rea regardless of the mens rea of the principal offender?

It was mentioned that the vagueness overshadows the view of Arabic legal commentaries regarding the issue of mens rea especially by applying the objective standard of fault within the required mens rea of accessorial liability. This leads us to favour intention. There are, however, many other good reasons for allowing criminal intention such a position. One central reason can be found in the words used by the F.P.C. to describe the required forms of accessorial liability, which suggests that the nature of all three forms of accessorial liability only requires criminal intention. For example, encouragement and conspiracy demand that the offender perform the prohibited action with intention, which means that fault is not of the essence in deciding the state of mind for accessorial liability. By way of assistance, the legislation states in article (45), that '*Providing assistance with knowledge that the things provided might be used in committing an offence.*' The term knowledge is understood as a metonym of the term intention, and rather than to suggest that fault is within mens rea of complicity.¹⁶⁰ Thus a simple reading of article (45) suggests that the natural meaning of the words 'encouragement, conspiracy, and assistance' signify a narrow state of mind standard based on criminal intention. It is very doubtful that the drafters intended to impose a broad mens rea for accessorial liability as in fault, because it represents an unwanted incrimination of ordinary actions, for

example in a situation where, in the course of his business, a person supplies goods or equipment later used by others to commit an offence. Such a situation is implicitly included in the F.P.C's treatment of accessorial liability in offences committed against the external security of the state. I shall examine the situation under these offences latter.

Second, in the sphere of criminality, accessorial liability may be defined as an attribute or condition attached to a number of crimes. Thus, it occupies middle ground between inchoate offences and the liability of the principal offender. However, the essence of accessorial liability brings it close to inchoate offences in terms of danger (rather than harm), the specified actus reus, causal connection, and the element of choice regarding the occurrence of harm. Considering the fact that an inchoate offence cannot be established by criminal fault and must be linked to intention, why should not accessorial liability have the same requirement of mens rea? There is no clear reason why encouragement, for example, should be treated differently in terms of the mental state required. It is wise to indicate that the same conditions of mens rea should be applied whether the form is an inchoate offence or a mode of accessorial liability.

Third, intention is the highest and most culpable state of mind in criminal law; this should be the mental state of those who secondarily participate in criminal offences because in fact they do not engage in bringing about the offence nor do they possess its mens rea? Accessorial activity in this connection is secondary in nature because

¹⁶⁰ Sidki, A., *op. cit.*, pp. 355-9.

often the principal offender controls the whole crime. One main factor in this is his choice to decide whether to bring about a crime, the accessory lacks such notion of choice. Consequently, a high standard should be required, otherwise it will bring some activities within the net of criminal law without properly addressing the creation of a distinction between wrongdoing and how should the law response to it. It initially seems difficult to make such a distinction in the activities of accomplices and to allow fault with its broad umbrella to play a part in deciding the required mens rea. Thus, some of those who advocate the fault approach decline to recognise such variance arguing, rather, for a unity in accomplice's mens rea as it is having the same degree of wrongdoing.

Fourth, it was noted that the article (45) of the F.P.C., in describing encouragement and conspiracy used the phrase: '*...and it occurs in accordance with such (encouragement, conspiracy)*'. This might possibly have been drafted to suggest that the existence of a causal connection between accessorial action and the main crime should be established. It might be possible also to infer from such words that the F.P.C. restricts the mens rea issue to intention only. Such an explanation is significant because we have already seen that there are problems in applying the test of causation to accessories in the same manner of the liability of the principal offender.

Fifth, an examination of some parts of the F.P.C. indicates that intention is the required state of mind for accessorial liability, for example, in Part One: Crimes against the security and interests of the State. Particularly in Chapter One, regarding

crimes against the external security of the state, the F.P.C. containing 24 articles [149- 173], mostly applies higher penalties to offenders, including the death penalty. It is probably true to indicate that the issue of accessorial liability in Chapter One (of the F.P.C.) is not entirely governed by the general theory of accessorial liability which is located in the general part of the F.P.C.

Article (171) regarding accessorial liability in crimes affecting the external security of the State indicates:

“A person is considered as *an accessory by causation* in crimes indicated in this chapter (Chapter One, articles: 149- 173) if he:

- 1) is aware of the criminal offender’s intention and supplies him with aid, means of subsistence, accommodation, shelter, a meeting place or other facilities, carries his letters, facilitate his search for the subject of the crime, concealed; transport; or provide him with information.
- 2) is knowingly conceals things used, or to be used in the crimes, or resulted from it.
- 3) destroys, steals, conceals, or purposely change the facts of a document which helps to detect the crime, evidence, or punish the offender.”

This article has many different implications but its central aim is to guarantee the assurance that accessorial liability, in this context, is judged separately from the general theory of accessorial liability. As it is clearly seen from the wording of article (171), the F.P.C. uses the terms awareness and knowledge to describe the mens rea required for assistance in these crimes. It is interesting to note that the F.P.C. adopts criminal intention in the general theory of accessorial liability, yet, exceptionally, departs from this in those crimes affecting the external security of the State, by requiring only knowledge or awareness that the provided help will be used to assist principal offenders or their associates. The F.P.C. in this regard expressly state the mental element in terms of knowledge in contrast with the general doctrine of accessorial liability, which lacks such reference. One might ask what is the main

reason behind this? There is no immediate answer, but perhaps the drafters chiefly believed in the importance of deterring any criminal acts against the State by extreme means. However, if this is the case, the F.P.C., in Chapter Two, regarding crimes affecting the internal security of the State, articles [174-201], does not act in line with the accessorial provisions of article (171). Chapter Two, however, states that encouragement and conspiracy are crimes of a principal offender rather than forms of accessorial liability; accessorial assistance is judged by the general theory of accessorial liability which requires criminal intention as the only form of mens rea.¹⁶¹

To conclude on this point, it can be argued that it would be wrong to judge the F.P.C. from a general perspective; one should, rather, focus on the whole set of articles, which, taken together, strongly suggest that intention is the required mens rea in accessorial liability. All the evidence seems to point to intention or willingness as the essence of accessorial mens rea. However, the worrying point is that the F.P.C. does not expressly indicate this. This might lead some judges to adopt fault as the required state of mind, according to the second school of thought. The prediction of failure of the courts is mainly based on the fact that legal issues are in the control of jurists trained in another legal tradition, who may not have full regard for the integrity of UAE law. This has not happened yet but it may well be a problem in the future.

¹⁶¹ See articles (187, 188, 191) and (192) of the F.P.C.

Chapter 4

Accessory liability for the additional offence:

‘The doctrine of common purpose’

Chapter 4

Accessorial liability for the additional offence: 'the doctrine of common purpose'

The term 'common purpose' has generally been employed in the doctrine of criminal complicity to resolve the liability of an accessory of a collateral crime committed by the principal.¹ In other words, this concept governs the liability of accessories where for example, P and A have agreed to commit crime X together, and this is the primary aim of their association. However, in the course of committing crime X, P commits an additional crime, Y. Is A liable for both crime X and crime Y? What factors decide the scope of A's responsibility for crime Y?

Usually a crime will not necessarily always be the only result of a plot. There might be unforeseen or undesirable results. For example, a robbery might lead to murder, or a theft might lead to an assault. Also procuring of abortion might produce the death of the woman. This concept, or doctrine, as it is often called, captures such accessorial activity that needs careful examination. One reason for this is that the culpability of the accessory, unlike the principal, is realised only under his mens rea because in the majority of common purpose cases, the accessory attitude is very negative in nature. In other words, the accessory does not commit the collateral offence's act, nor does he possess the mens rea required of the principal. For instance, he might be present at the committing of the offence but not actually

contributing in any way to the collateral crime; he might also be present, but in another room of the house where a murder has been committed by the perpetrator; he might be outside providing a look-out to the other accomplices and might not know what actually happened at the scene of the crime. Therefore, many questions arise from this doctrine. This chapter discusses the ambit of such liability in both English law and in UAE law.

English Law

Generally speaking, accessorial liability consists of the general body of concepts or rules that governs the prior or contemporary activity or association of an accessory who is responsible for the principal offender's criminal behaviour.² One part of such criminal liability is the concept of common purpose, which means: The rules that direct the liability of an accessory who participates in a joint enterprise, make him liable for any additional offence committed by the principal. The accessory is liable for this either if he has expressly or implicitly agreed on the committing of the collateral offence, or he has contemplated the possibility that the principal might commit that additional offence, and nevertheless, continued with the enterprise.³

¹ Gillies, P., *The Law of Criminal Complicity* (1980), Australia: The Law Book Company Ltd. p. 93. The first sign of the term 'common purpose' suggests that accomplices share the same state of mind required for the offence but in general practice this view is not true in English law.

² Smith, K.J., *A Modern Treatise on the Law of Criminal Complicity* (1991), Oxford: Oxford University Press. pp. 1-2.

³ Presumably, the current situation in English law would require foresight only as the sufficient mens rea. See for example Smith, K., *MTLCC, op cit.*, p. 237; One must note that J.C. Smith emphasises that the concept of common purpose is a major part of the doctrine of complicity, and he heavily

Maklin (1838) best describes the concept:

“It is a principle of law that if several persons act together in pursuance of a common intent, every act in furtherance of such intent by each of them is, in law, done by all.”⁴

Although most cases dealing with this doctrine are concerned with collateral liability for homicide, it is relevant to any other crime.⁵

Subjective versus Objective

The principle of individual autonomy suggests that a defendant should be responsible for his own behaviour, which is based on his free will and his making of choices and decisions. The principle of *mens rea* puts this into practice by requiring that a defendant should only be held liable for either intention or contemplation of a forbidden event or consequence. This, in fact, is understood as a subjective requirement of awareness to hold a person responsible for a criminal outcome. Besides this, there is another contrary concept, namely, the objective view of liability, which is constructive in nature and broadly concentrates on the prohibited result. The objective view in criminal law maintains that the occurrence of the harm defined by the offence is highly relevant, while the subjective view indicates that

criticises the estimation of LC. No. 131, which suggests that such doctrine should be abolished. Smith, J.C., “Criminal Law of Accessories: Law and Law Reform” (1997) 113 *L.Q.R.* 453 at 461-5. Many terms are used by legal commentators to describe this liability such as: joint enterprise; common design; common pursuit; and the liability for unintended consequences.

⁴ *Maklin* (1838) 2 *Lew CC* 225, *per* Alderson B, cited in LC. No. 131.p. 7.

⁵ Smith, K.J., *MTLCC*, *op cit.*, p. 210; Clarkson, C. M., “Complicity, *Powell* and Manslaughter” [August 1998] *Crim. LR* 556 at 560; Smith, J.C., “Criminal Law of Accessories: Law and Law Reform” *op cit.*, 453; also it is worth mentioning that accessorial liability is discussed by Hale, *Pleas of the Crown*, under the crime of murder; *Cf.* LC. No. 131 p. 145.

such harm is irrelevant and only the accused's state of mind is more important. This argument is unbroken in all aspects of responsibility.⁶

This led some commentators to assume that subjective versus objective is the main issue which underlines the theory of criminal liability. For example George Fletcher (1988) indicates:

“The traditionalists root their case in the way they feel about crime and suffering. Modernists hold to arguments of rational and meaningful punishment. Despite what we might feel, the Modernists insist, reason demands that we limit the criminal law to those factors that are within the control of the actor. The occurrence of harm is beyond his control and therefore ought not to have weight in the definition of crime and fitting punishment. The tension between these conflicting schools infects virtually all of our decisions in deciding a system of crime and punishment.”⁷

English law has been clearly moving towards a subjective basis of criminal liability that requires a focus on the accused's state of mind rather than adopting a constructive liability.⁸

The subjective version would require the jury to put themselves in the position of the defendant at a specific moment to infer that he either intended or contemplated the result. The objective view focuses on the prohibited outcome by linking the accused's liability to the harm caused on ‘the reasonable man’ test. This means that if a rational man, in the position of the defendant, intended or contemplated the prohibited event or consequence, then the accused is liable.

⁶ Robinson, P. H. & Darley, J. M., “Objectivist Versus Subjectivist Views of Criminality: Role of Social Science in Criminal Law Theory” (1998), 18 *Oxford Journal of Legal Studies*, Vol. 18 Autumn, p. 409 at 414- 415.

⁷ Fletcher, G., *A Crime of Self Defence: Bernhard Goetz and the Law on Trial* (1988) at 64. Cited in Robinson, P. H. & Darley, J. M., “Objectivist Versus Subjectivist Views of Criminality” *op. cit.*, p. 415.

⁸ Ashworth, A., “Transferred Malice and Punishment of Unforeseen Consequences”, in Glazebrook, P. R., (ed.) *Reshaping the Criminal Law* (1978), London: Sweet & Maxwell. at p. 77.

It has already been pointed out that to constitute a person as an accessory to an offence, he must have knowledge of essential matters of the offence. This explores the theory that the basis of accessories' criminality in the primary offence is subjective in nature, and this is true regarding his involvement in an additional crime of the joint enterprise with the principal offender. Some might argue that if English law chooses subjective standards regarding the issue of mens rea in both primary and collateral offences, then there is no need to discuss the 'subjective versus objective' issue. However, English law used to adopt an objective basis of liability in common purpose cases for additional offences committed by the principal offender, namely, the test of the rational man or probable consequences, which connects the guilt of a person to a presumed criteria of liability, something that would assist the jury in linking a person with an offence. Moreover, Arabic criminal jurisprudence, as in the case of UAE F.P.C., adopts, somehow, an objective basis of liability for the guilt of an accessory to a collateral offence committed by a perpetrator. It has been argued that the objective view of liability that used to be prevalent in English law was the historical background for the UAE Code through the medium of Egyptian law. I shall discuss this later to see if this is true.

Legal commentary at this point differs. For example, Ashworth (1995) indicates that:

"A hundred years ago Sir James Stephen stated the test as whether the crime committed by the principal could be regarded as 'probable consequence' of the common design, an objective test of foreseeability, to be applied to the point at which the assistance was given or the agreement reached."⁹

⁹ Ashworth, A., *Principles of Criminal Law* (2nd ed. 1995), Oxford: Oxford University Press. p. 431.

This indicates that Stephen was the first to introduce the objective test of foreseeability in the doctrine of common purpose, which at the same time suggests that such a test only occurred in the mid-nineteenth century (1800).¹⁰ However, P. Gillies (1980) takes another view, stating that:

“The requirement of subjective contemplation on the part of the accessory has not always prevailed. Prior to 1700, a number of English Judges took the view that a person who had conspired with another for the commission of crime X could be inculpated as an accessory to the latter’s commission of the crime Y, provided that Y was objectively incidental to their joint commission of X.”¹¹

Other commentators were either silent or obscure on this issue. Thus, one must examine some cases, cited by legal commentary, in order to gauge the courts attitude regarding subjective or objective tests to understand the concept of common purpose.

In *Mansell and Herbert* (1556), a person seized some goods belonging to a Frenchman during wartime, and took them to his house. A man pretending to be a vice- admiral came to the house with servants and assaulted a person there. One of the servants killed a woman at the house. The Court held that:

“Where persons assembled with force to seize goods under pretence of lawful authority, and a woman coming out of the house was killed by a stone thrown by one of the assailants at another person in the gateway, this is murder in them all.”¹²

¹⁰ James F. Stephen was born in 1829 and started his real career in 1859. See: Cross, R., “The Making of English Criminal Law: Sir James Fitzjames Stephen” [1978] *Crim. LR* 652.at pp. 652-3.

¹¹ Gillies, P., *Criminal Complicity, op. cit.*, p. 93.

¹² *Mansell and Herbert* (1556) 73 ER 279.

This case implicitly suggests that the test is objective, although some of the judges pointed out that if no malice was intended, then charge of murder cannot be extended to others.¹³

In *Thody* (1663), P and A engaged in a fight with two others C and D, and A killed C. Both were convicted of manslaughter. The Court agreed that if two persons engage in a fight that leads to the death of an opponent they are guilty of manslaughter, and if both came with an intent of malice, then both are guilty of murder. However, if one party who is responsible for the death came with malice and the other had not, the first is guilty of murder while the other is guilty of manslaughter.¹⁴

Although not totally clear, this case relies on subjective bases of liability as it is implicitly understood by its facts, but like the former test, both courts did not use the term common purpose, joint enterprise, or any usual current vocabulary of the liability of accessories for collateral offences.

In *Lord Mohun* (1692), a murder case, the Lords asked the judges to answer seven questions. A related question was:

“5- Whether a person, knowing of the design of another to lie in wait to assault a third person, and accompanying him in that design, if it shall happen that the third person be killed at that time, in the presence of him who knew of that design, and accompanied the other in it, be guilty in law of the same crime with the party who had that design, and killed him, though he had no actual hand in his death?

Ans. If a person is privy to a felonious design, or to a design of committing any personal violence, and accompanieth the party in putting that design in

¹³ *ibid.* 73 ER 279 at 300.

¹⁴ *Thody* (1663) 89 ER 386.

execution though he may think it will not extend so far as death, but only beating, and hath no personal hand, or doth otherwise contribute to it than by his being with the other person, when he executeth his design of assaulting the party, if the party dieth, they are both guilty of murder. For by his accompanying him in the design, he shews his approbation of it, and gives the party more courage to put it in execution; which is an aiding and abetting assisting and comforting of him, as laid in the indictment.”¹⁵

This case illustrates that if an accessory joins the principal in assault which leads to the killing of the victim, his culpability is based on an objective test, and he is liable for murder, as is the principal, regardless of whether the accessory had thought that the assault would lead to murder. However, like the previous cases, the court did not expressly state that the test was objective, but this is implied from the verdict. It neither relied on a precedent nor on a commentary. Moreover, the court somehow suggested that the accessory in collateral offences committed an actus reus because he was present at the scene of the crime, which gave the principal courage to commit the murder. Should this suggest that an absent party, if any, would escape conviction? The case does not answer this. Did the following cases stop at this stage of using objective criteria?

The ambiguity of the English courts regarding the issue of ‘subjective versus objective’ continued. In *Anonymous* (1723)¹⁶ A and P were assaulting C. D, a stranger, tried to intervene peacefully, but P ran to D and stabbed him with a knife. Both A and P were charged with murder. However, the judges agreed that A could not be responsible for murder because it did not appear that he intended any injury to

¹⁵ *Lord Mohun* (1692) 90 ER 1164 at 1164-7.

¹⁶ *Anonymous* (1723) 88 ER 121.

the person killed. The court here moved again to the subjective standard but did not make it clear. Also, unlike the previous cases, the court for the first time started to speak about intention, which is subjective in nature, although no reference was made to the term 'common purpose.'

By the nineteenth century, cases became more clear on the subject. For example, in *Rex v. John Leonard White and John Richardson* (1806)¹⁷ two accomplices were charged with attempted burglary and the collateral offence of assaulting a watchman who tried to arrest the principal after chasing him. The judge directed the jury, that if the accessory had the same illegal purpose, and both determined to resist which might be part of the plan to use force, then both are guilty of assault. Such inference would be implied from the evidence surrounding the case. The jury inferred no common purpose and the accessory was acquitted. As it was seen, the case adopted subjective criteria, which was taken up by following cases. For instance in *Rex v. Collison* (1831)¹⁸ two private watchmen, seeing P and A with two carts laden with apples, suspecting them to be stolen, went to apprehend them in order to get assistance. One watchman approached P and the other approached A. However, P assaulted the first watchman using a bludgeon. Both P and A were indicted for an assault and wounding with intent to murder. Garrow B. said:

"To make the prisoner (A) a principal, the jury must be satisfied, that, when he and his companion went out with a common illegal purpose of committing the felony of stealing apples, they also entertained the common guilty purpose of resisting to death, or with extreme violence, any persons who might endeavour to apprehend them; but if they had only the common purpose of stealing, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and proceeded from the

¹⁷ *Rex v. John Leonard White and John Richardson* (1806) 172 ER 469- 470.

¹⁸ *Rex v. Collison* (1831) 172 ER 827.

impulse of the moment, without any previous concert, the prisoner will be entitled to an acquittal.”¹⁹

As it appeared, the verdict was not guilty. The court selected subjective criteria and used the usual language which is found in cases nowadays. However, the court did not expressly give any indication of its use of the subjective version. Was it agreement or contemplation? No clear answer can be obtained from the ruling, although it is possible to say that the court had in mind the agreement test regarding the additional offence.

In *Macklin, Murphy, and Others* (1838)²⁰ a group of people had gathered and were committing a riot. Constables intervened to disperse the crowd and arrested the offenders but one constable was beaten severely by the mob using sticks, stones, and fists, and this led to the constable’s death. Alderson, B. said:

“ ...You the jury, must determine, whether all these prisoners had the common intent of attacking the constables- if so, each of them is responsible for all the acts of all others done for that purpose; and, if all the acts done by each, if done by one man, would, together, shew such violence, and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all. If you would not infer such a purpose, you ought to find the prisoners guilty of manslaughter.”²¹

As a result of this direction, the accomplices were convicted of manslaughter. The case illustrates the fact that its interpretation to the formula of additional offences is subjective by directing the jury to infer the common intent. Presumably, the court at the final ruling had in mind the scope of the accomplice’s real plots or in other words their express or tacit agreement to the primary offence of riot. Having said that, the

¹⁹ *ibid.* at 828.

²⁰ *Macklin* (1838) 168 ER 1136.

court in fact used the two functions of criminality - subjective and objective versions- and tried to apply them in this case, in spite of the fact that these two versions are actually in conflict with each other and indicate different kinds of justification. Alderson B tried to link the two concepts by revealing that the act must be in pursuance of common intent, and that if a deadly weapon was used, it is reasonable to infer the parties intention to murder whereas if no weapons was used, only fists, then it is not reasonable to infer such intention, and it is only manslaughter.²²

However he later said:

“Again, if the weapon used is not deadly, e.g. a stick, then the same question as above will arise for the determination of the jury, as to the purpose to kill; and in any case if the nature of the violence, and the continuance of it be such as that a rational man would conclude that death must follow from the acts done, then it is reasonable for a jury to infer that the party who did them intended to kill, and to find him guilty of manslaughter.”²³

Unlike in the previous cases, the court for the first time used the term ‘rational man’ or in other words the ‘reasonable man’ test. However it is not clear that the court or the jury in fact used it in this case, especially since the facts indicate that the constable was heavily beaten. A reasonable person would conclude that it was murder but the outcome of this case was a conviction for manslaughter.

K. Smith (1991) claims that no clear authoritative principle emanated from the previous cases.²⁴ However, although those cases were ambiguous and hazy, and moved from one standard to another without declaring that either subjective or objective criteria should be adopted in future cases of common purpose, it could be

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*

said that they did establish a point that there are two standards of responsibility and it is necessary to elaborate on them in order to adopt one particular standard. Perhaps it was Michael Foster who noticed such a distinction of subjective and objective requirements from those previous cases, and tried to modify the objective criteria by linking it to the test of probable consequence. He states that:

“...So where the principal goeth beyond the terms of solicitation, if in the event the felony committed was probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony.”²⁵

Foster’s suggestion is generally inspired by a notion of criminal liability based upon objective character, and not concerned with the accused’s state of mind or the notion that the accused have to contemplate the outcome. Foster’s view was that an accomplice should be held responsible for events and consequences, even if they were beyond his original intention, if those events or results in the ordinary course of things were a probable consequences of the principal’s action.²⁶ Only accessories before the fact and abettors were subject to this objective standard.²⁷ This was also the approach in both draft codes of 1843 and 1846. The 1879 English Draft Code moved forward by applying Foster’s probable test in general regarding the responsibility for the consequences of the common purpose.²⁸

²⁴ Smith, K., *MTLCC*, *op. cit.*, p. 212.

²⁵ Foster, M., *Crown Cases* (3rd ed. 1809) p. 370. *R v. Betts and Ridley* [1930] 22 Cr. App. Rep. 148, is a supportive case to what Foster had suggested.

²⁶ Ashworth, A. J. “The Making of English Criminal Law: Blackstone, Foster and East ” [1978] *Crim. LR* 389 at 396.

²⁷ *ibid.* at 39; Smith, K., *MTLCC*, *op. cit.*, p. 212.

²⁸ Smith, K.J.M. *M.T.L.C.*, *op. cit.*, p. 213 at note 16, states that: “Ss. 71 makes anyone who ‘aid or abets’ ‘counsels or procures’ a ‘party’ to the offence. Its final paragraph extends ‘common purpose’ liability to any offence committed in pursuance of the common purpose or which ‘ought to have been known to be a probable consequence of the prosecution of such common purpose’. This provision, therefore, applies to any party whether present or not when the collateral principal offence is committed.”

James Stephen, shares a similar view in stating that:

“ When several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that common purpose. ...If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree, nor accessories unless they actually instigate or assist in its commission... If a person instigate another to commit a crime, and the person so instigated commits a crime different from the one which he was instigated to commit, but likely to be caused by such instigation, the instigator is an accessory before the fact.”²⁹

This might suggest a combined agreement between English commentators regarding the objective test in cases of common purpose. However, this is not the case. *Russell on Crime*, for example, an authority much used by English judges, does not take this view of the matter. As K. Smith indicates in the 1843 and 1865 edition of Charles Greaves no reference was made to suggest that the objective criterion is the one to adopt in relation to liability for criminal complicity of common purpose.³⁰ Surprisingly the editor of the 1877 edition, Samuel Prentice, suggests the test is objective when he states that:

“It is submitted that the true rule of law is, that where several persons engage in the pursuit of a common unlawful object, and one of them does an act which the others ought to have known was not improbable to happen in the course of pursuing such common unlawful object, all are guilty.”³¹

The above view stood until Turner’s 1958 edition of *Russell*, where it was omitted with no clear reason. The actual wording cited in the 12th ed. of *Russell on Crime*, is:

“ There has been much discussion as to the liability of an accessory when the principal does not act in conformity with the plans and instructions of the accessory. If the principal totally or substantially varies from the terms of the instigation, if being solicited to commit a felony of one kind, he wilfully and

²⁹ Stephen, J.F., *Digest of the Criminal Law* (4th ed. 1887), London. pp. 32-34, arts 38, 41.

³⁰ Smith, K., *MTLCC*, *op. cit.*, pp. 211- 214.

³¹ *Russell on Crime*, (7th ed.) p. 114.

knowingly commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt...”³²

“Nowadays, it is submitted, the test should be subjective and the person charged as accessory should not be held liable for anything but what he either expressly commanded or realised might be involved in the performance of the project agreed upon. It would on this principle, therefore be a question of evidence to satisfy the jury that the accused did contemplate the prospect of what the principal has in fact done.”³³

This controversy over the battle of subjective and objective criteria in the field of common purpose is best described as unsteady (moving from one side to another). The court decisions were faltering between them in a vague way without a clear visibility of which one to adopt as the only form of liability. The courts, in those decisions did not make a direct move to avoid such ambiguity. It would have been better if it had declared one of the tests appropriate in order to clarify matters to the parties concerned in a criminal case. For example, a defence lawyer would prefer to know what the law says on this point, in order to make his defence. If it is objective he would provide a defence from the objective standard, namely, from the notion of the ‘ordinary man’ and would argue for acquittal. On the other hand, if the test is subjective, he would try to find an answer from a subjective point of view, for instance by proving that the defendant, before or at the time of the committing of the additional offence, did not contemplate the outcome.

³² Turner, J., *Russell On Crime*, 12th ed. p. 160.

³³ *ibid.* pp. 162. K. Smith suggests that the omission of the paragraph of the objective standard in the 1877 edition was because of the new cases of complicity which stressed the subjective criteria by requiring knowledge of essential matters on the part of accessories before linking them to the doctrine of criminal complicity, and the rejecting of felony-murder rule by the Homicide Act 1957. See: Smith, K.J., *MTLLC, op. cit.*, pp. 213- 214.

This is also true in relation to the prosecution, juries and the judges themselves. An example of such controversy is found in *Pridmore* (1913),³⁴ where A and P were out poaching and were being watched by three keepers. P had a hunting gun while A had a stick with him. In order to avoid apprehension P fired at one of the keepers. There was disagreement about who had fired the shot, but the judge directed the jury that it did not matter since there is a common agreement between the parties. Both A and P were charged with attempted murder. They appealed on the ground that there was no evidence that there was a common purpose between the two parties and that the court inferred that A, by holding the stick at the keepers, was evidence of a joint enterprise, when in fact it had been done in a defensive manner. Surprisingly, the Crown argued otherwise by quoting the objective standard as supported in *Russell*.³⁵ One of the judges suggested that the court should follow *Doddridge* (1860) where it was held that a common intent to poach does not sustain the allegation of intent to wound, and that what the Crown mentioned would only apply to some kinds of crime like assembly and riot.³⁶ However, Phillimore J, in delivering the judgement, did not rely on his colleague's submission, and also did not make a reference to what the Crown indicated. He dismissed the appeal on the ground that there was a common purpose between the parties demonstrated by the fact that A did indeed brandish a stick at the keepers. As it turned out, the court did apply a subjective version but it is strange that the Crown was in doubt about the law on that point, which indicates that there was a problem over which type was the one to apply.

³⁴ *Pridmore* (1913) 8 Cr. App. Rep. p. 198. Cf. *Pearce* (1929) 21 Cr. App. Rep. 79.

³⁵ *Russell on Crime*, (7th ed.) p. 114, indicates that "it is a rule of law, that where there is a joint enterprise with unlawful object, and one party does an act which the others ought to have known was not improbable to happen in the course of pursuing such common unlawful object, all are guilty." The Crown did not support any precedent for this. See *Pridmore* (1913) 8 Cr. App. Rep. pp. 200-201.

Probably this controversy of accessorial liability in collateral offences was a result of the felony- murder rule. As Lanham indicates (1983), this rule means that a person may be found guilty of murder if in the course of committing a felony he kills, even though he does not intend to cause any harm and is not reckless as to the harm done.³⁷ Such a rule was accepted during the nineteenth and the twentieth centuries but its roots are found in Coke's time, as he was the founder of such a concept.³⁸ English law featured some changes towards the subjective version of culpability, such as the abolition of felony- murder by the Homicide Act 1957, the Criminal Justice Act 1967,³⁹ and, more importantly, the court decisions of *Bainbridge* and *Anderson and Morris*.

The move to the subjective criteria:

English law has considered some changes in the subjective standard required for additional crimes in accessorial liability and seems to be leaning towards establishing an accepted formula. In this section, I shall examine some leading cases.

³⁶ Lord Coleridge in *Pridmore* (1913) 8 Cr. App. Rep. p. 200.

³⁷ Lanham, D., (1983) "Felony Murder-Ancient and Modern" *Criminal Law Journal* 90.

³⁸ *ibid.* pp. 91-94. It might be assumed that English law, in relation to complicity, tried to act in accordance with such a concept of principal liability. However, even though Foster was supportive of the felony-murder rule it appears that he did not want the same rule to be applied in relation to accessories by introducing the objective standard of culpability, where in the felony-murder rule the guilt is not attributed to negligence. See: Lanham, D., "Accomplices and Constructive Liability" (1980) 4 *Criminal Law Journal* 78.

³⁹ Section 8 of The Criminal Justice Act 1967 indicates: "A court or a jury, in determining whether a person has committed an offence a) shall not be bound in law to infer that he intended or foresaw a result of his action by reason only of its being a natural and probable consequence of those actions; but ... b) shall decide whether he did intend or foresee that result by reference to all evidence, drawing such inferences from the evidence as appear proper in the circumstances."

In *R v. Anderson and Morris* (1966)⁴⁰ W met A's wife, a convicted prostitute, and she took W to her flat where, it was said, he tried to strangle her. She ran out into the street, chased by W, where she met M, told him what had happened, and M and W fought, but were separated by another person. A arrived, learned from his wife what had happened, got a knife in M's presence, and went with M and his wife to find W. When they found him, M said: 'Here he comes now' and there was a fight in the street, resulting in A stabbing W to death. A was punching W, and M was standing at W's back not taking any part in the fight. When W was trying to push past A, A stabbed W to death. A denied that M had assisted him, and also said that M refused to help him in the fight. M said that he did not know about the knife being used and that he only fought with W earlier on but not in the incident when W died. In the early stage of the case the jury was directed that:

"If you think there was a common design to attack W but it is not proved, in the case of M, that he had any intention to kill or cause grievous bodily harm, but that A, without the knowledge of M, had a knife, took it from the flat and at some time formed the intention to kill or cause grievous bodily harm to W and did kill him - an act outside the common design to which M is proved to have been a party - then you would or could on the evidence find it proved that A committed murder and M would be liable to be convicted of manslaughter provided that you are satisfied that he took part in the attack or fight with W."⁴¹

A, the principal, was convicted of murder, and the accessory, M, was found guilty of manslaughter. They both appealed against the conviction.

The relevant issue for discussion is M's appeal, which was on the ground that there was a misdirection by the trial judge based upon the notion that the doctrine of

⁴⁰ *R v. Anderson and Morris* [1966], 2 Q.B. 110.

⁴¹ *ibid.*

common purpose holds accessories responsible for the committing of a collateral offence if that offence is pursuant of the joint criminal venture. However, if one party goes beyond that which was expressly or tacitly agreed, the other is simply not liable for the unauthorised act. In addition, it is the duty of the jury to decide whether the act was or was not part of the common purpose. The court did not invite the jury to draw the distinction between acts within the common purpose and the acts which are outside it.⁴²

The Court of Criminal Appeal examined the case and heard the defence and the Crown for their argument. The ruling favoured of the defendant in that it held:

“Where two persons embarked on a joint enterprise, each was liable for the acts done in pursuance of that joint enterprise including liability for unusual consequences if they arose from the agreed joint enterprise, but that, if one of the adventurers went beyond what had been tacitly agreed as part of the common enterprise, his co-adventurer was not liable for the consequences of the unauthorised act, and it was for the jury in every case to decide whether what was done was part of the joint enterprise or went beyond it and was an act unauthorised by that joint enterprise. Accordingly, since the jury were directed that, in law, they could or should convict M of manslaughter even though he had no idea that A had armed himself with a knife, they were misdirected and M’s conviction had to be quashed.”⁴³

The case recognises the subjective standard but what is the ambit of these criteria?

⁴² *ibid.* pp. 113-114. [1966] 2 Q.B. At the Appeal Court the Crown said that the direction was right. They relied on *Salisbury’s case* [1553] 1 Plowd 10, which indicated that: “if two or more persons engage in an unlawful act and one suddenly develops the intention to kill or do grievous bodily harm whereby death results, the killer is guilty of murder and the other persons are guilty of manslaughter.” *Ibid.* p.114. However, Lord Parker C. J. said: “Be that as it may, this court is quite satisfied that they should follow the long line of cases to which I have referred, and it follows accordingly that, whether intended or not, the jury were misdirected in the present case, and misdirected in a manner which really compels this court to quash the conviction. In the result, therefore, leave to appeal will be granted to both the applicants; this will be treated as the hearing of the appeal and, instead of quashing the conviction of Anderson, the court will direct a new trial under section 1 of the Criminal Appeal Act 1964. In the case of Morris, the court will allow the appeal and quash the conviction.” *ibid.* pp. 120-121.

⁴³ *ibid.* p. 110.

As already stated, the Court in *Anderson & Morris* confirmed three principles:⁴⁴

1- every party engaging in a joint enterprise is liable for acts done in pursuit of that enterprise even if it has unusual consequences.

2- if one party goes beyond what has been tacitly agreed, the other party is not liable for the unauthorised act.

3- it is a factual matter for juries to decide whether what has been done was a part of the joint enterprise or went beyond it.

Simon Bronitt claims that the Court of Appeal in this case formulated the subjective standard in common purpose cases. However, this is questionable because, firstly, we have seen in the previous pages the movement of English courts between the two standards of culpability, and secondly as John Smith points out, the Court of Appeal in this case considered a line of authorities from 1830 and delivered judgement by five members of the court.⁴⁵

This case adopts the subjective standard based on agreement or an authorisation test to hold an accessory as a party to the collateral offence. Thus, the precept of attaching one party to the liability of an unwanted result is either express or tacit agreement.⁴⁶ One important result here that what goes outside the express or tacit

⁴⁴ *ibid.* at p.118. Supported by *Davies v. D.P.P.* [1957] AC 378; *Lovesey & Peterson* [1970] QB 352, quoted in L.C. No.131 p. 59.

⁴⁵ Bronitt, S., "Parties to a Crime" <http://law.anu.edu.au/criminet/notes.html/>; Smith, J.C. & Hogan, B., *Smith & Hogan Criminal Law Cases and Materials*, (6th ed. 1996) London: Butterworths. p. 232.

⁴⁶ See for example McCall Smith, R.A. & Sheldon, D., *Scots Criminal Law* (1992), Edinburgh: Butterworths, p. 83 where they indicate: "What is implicitly agreed will depend on the circumstances: an agreement to commit robbery involves an agreement to use at least some degree of force; an agreement to break into building involves implicit agreement to damage property in course of gaining access."

plan will not be taken into account against the secondary party, even though he did contemplate the unwanted outcome.

What was the reason behind the court decision? In other words, what is the basis of guilt under the express/ tacit agreement formula?

Nothing is suggested by the Court of Appeal in this case, but presumably one of the following would be true:

- 1- Assent or approval.
- 2- Joint contemplation between the accomplices.
- 3- Defence of the agreed plan.

1- Assent: Keith Smith suggests that the Court of Appeal in this case favours connecting guilt to the notion of consent between the parties. Although he admits that was not the reasoning of the case, he does not share its view by indicating that the language of cases in this field of liability prefers the term ‘contemplation’ rather than ‘agreement’.⁴⁷ This latter view is rather strange because even if some previous case used the language of foresight or contemplation instead of agreement, the Court of Appeal here expressly chooses the latter, and in fact went on to examine the concept of common purpose from 1830 until 1966. Moreover, if the judgement was based on the notion of consent or willingness that the principal should commit the additional offence, it would suggest that the required mental state of accessories is intention, because consent is a concept much more closer to intention rather than other features of mens rea. This would be a vague outcome especially where the test

⁴⁷ Smith, K., *MTLCC*, *op cit.*, pp. 218-219.

in the primary offence is knowledge or recklessness. Did the court here, in the additional offence, want to move to intention?

If so, should it only be purpose, which employs assent or willingness in its application, or would it also cover oblique intention? This latter concept of contemplating a result which requires virtual certainty is not intention in itself; it is only evidence from which the jury can infer criminal intention. The court did not offer any guidelines in this respect. Another point to mention is that agreement, or in other words conspiracy, is not an essential element in establishing accessorial liability. This by the same token would require accomplices to be jointly acting and that they know each other, which is also not required especially if the accessory's involvement is based on assistance rather than encouragement. The court again is not clear on the issue. It might be noted that John Smith implicitly admits that assent or approval is not the essence of accessorial guilt in this type of liability. He indicates that:

“It may be that the law is too harsh and, if so, it could be modified so as to require intention (or even purpose) on the part of the accessory that, in the event which has occurred, the principal should act as he did. Indeed, there is no decision preventing the House of Lords from taking this step and it is possible that they will shortly be invited to do so. If it were to be decided that intention should be required, the jury would be told that they should not find D [the accessory] guilty of murder unless they were sure that D either *wanted* P to act as, with the intention which, he did, or knew that it was not merely a ‘real possibility’ but *virtually certain* that he would do so.”⁴⁸

⁴⁸ Smith, J. C., “Criminal liability of Accessories: Law and Law Reform” *op. cit.*, p. 465.

2- Joint contemplation: Simon Bronitt in his commentary of an Australian case, *John* (1980),⁴⁹ which has similarities with *Anderson and Morris*, suggests that the court in using an agreement test regarding the committing of the accidental offence means it requires a joint contemplation between the parties.⁵⁰ This would mean that there must be a sharing of a state of mind between the accomplices, and more precisely, that parties have to jointly contemplate the possibility of the occurrence of the further offence. This view emphasises the notion that accomplices are acting within a common design, and that they know each other. However, there are some weak points in this argument. First, parties of a criminal venture may not have known each other. In other words, accessorial liability can be established without knowledge between the parties if their action together produces a criminal result. Second, if the court's reason to invoke the agreement test is that it requires joint foresight, accessories can escape liability for additional offences if the principal lacks contemplation regarding the committing of the other offence and is convicted on the basis of an objective state of mind. An example might provide clarity. Suppose that P and A want to burgle a house, and they manage to do so by entering through an open window. On the way out P accidentally commits simple damage to a valuable item. This latter offence is governed by Criminal Damage Act, S.1 (1), which can be proved on the basis of objective recklessness, which was the situation of P. If the notion of guilt in common purpose is the joint contemplation, then A can escape liability proving that P had no such thought even if A himself did think of such possibility. Also, requiring joint contemplation suggests that accomplices share such foresight before the criminal venture but in many examples only accessories would

⁴⁹ *Johns v. The Queen* [1980] 143 C.L.R. 108, decided by the High Court of Australia.

think that something might go wrong before the committing of the primary offence, like robbery-murder for example, while the principal or principals would have such thoughts required for the offence just shortly before the committing of the additional offence. This concept of joint contemplation would not be favoured in English law, and it might not be the reason of the verdict in *Anderson and Morris*. Moreover, it clearly appears that the doctrine of common purpose does not link the accessorial guilt to a jointly state of mind. Accessories have their own mens rea, which is different from that required for the principal.

3- Defence of the agreed plan: The third possible basis of the judgement in *Anderson and Morris* is that there was consensus or contemplation on the part of the accessory offender but such a basis perhaps has a further aim which is creating a defence of the agreed plan. As matter of common sense, when the court spoke of agreement or authorisation, there should be an understanding between the parties that the additional crime should be committed. On the other hand there is a possibility that the court was thinking of linking the test of incrimination to contemplation, not necessarily jointly, but that the secondary party contemplates the possibility that something might go wrong.⁵¹ Both tests are likely to be correct but it is also probable that the court implicitly wanted to establish a special defence to accessories to hold against any departure from the normal course of events that might produce an

⁵⁰ Bronitt, S., "Parties to a Crime" <http://law.anu.edu.au/criminet/notes.html/>.

⁵¹ Lord Parker C.J. said: "it seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from that concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today" in *Anderson and Morris* [1966] 2 Q.B. *op. cit.* p. 120. Accordingly, what would be the situation if the secondary party suspects or contemplates the additional offence? Lord Parker does not answer this.

unwanted result. The Court of Criminal Appeal here indicates that it followed many authorities from the last 130 or 140 years, which suggests that it did not establish a new formula. But in fact this is not the case because it used a new language of agreement or words corresponding it, such as 'authority'.

Suppose that a person has knowledge of criminal law. He becomes an accessory to crime, and he wants to limit his liability. He would rely on that phrase been invoked by the Court here to avoid conviction by having signed an agreement with his accomplices to follow the agreed plan and that there should be no use of weapon or if used it should be for frightening and nothing more. Perhaps he can film what they agreed about. This example might seem odd but it is possible from what the Court said about a departure from the agreed plan.

All in all, as I have illustrated above, the attitude of the courts move in a subjective line but under one or two of above three possible foundations of guilt. The question now is whether the English courts will settle on this formula?

In *Chan Wing-Siu v. The Queen*,⁵² a case decided by the Privy Council on appeal from Hong Kong, three persons were convicted of murder and wounding with intent. It appeared that they went to the victim's flat, armed with knives, to rob him. Two accomplices stabbed him to death and his wife was assaulted. In their defence it was argued that the test of foresight, if sufficient for conviction, must be based on

⁵² *Chan Wing-Siu v. The Queen* [1985] AC168.

contemplating the offence as a probable incident only.⁵³ However, their appeals were dismissed.⁵⁴

Sir Robin Cooke said:

“The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.”⁵⁵

As clearly indicated, the test of mens rea mentioned by Cooke entirely focuses on foresight or words corresponding to it. As he says, it is based on a wider formula or principle than the agreement test stated in *Anderson and Morris*.⁵⁶ A simple

⁵³ The defence for the defendant said that the Crown must prove that the accused foresaw the probable reaction to that contingency by his co-adventurer, and this means for them that the guilt should be based on a matter of a degree. In addition, it suggested that the Court here should decide the case on the agreement test, either expressly or tacitly. The Crown made three objections to that: 1- There is no such authority in English or Commonwealth law to support this defence contention. 2- It is misleading to use the word “possibility” and “probability”. Juries must use their common sense and give words their ordinary meaning. The issue of degree, as the defence suggested, is sufficient for discussing the concept of recklessness, which is decided objectively, but the issue of this should be examined subjectively. 3- Public policy aim to the prevent crimes requires that the person who lends himself to a criminal enterprise with the knowledge that it involves the possession of weapons which in fact are used by his partners, should not escape conviction by reliance upon the nuances of prior assessment of the likelihood that such conduct will take place. He should be as liable as the other accomplices. *Chan Wing-Siu v. The Queen* [1985] AC168. pp. 170-173. As it will be seen, the Privy Council was strongly supportive of these arguments of the Crown.

⁵⁴ The two defendants, armed with knives, forced their victim into the kitchen where he was stabbed, while the third person guarded the wife. When they left the flat, the deceased’s wife was slashed across the head. Three bloodstained knives were left in the flat. The three accomplices told the police that they went to the flat to collect a debt owed by the deceased to the third appellant. Only the first and second appellants admitted taking a knife and knowing that the others had knives. The accomplices pretended that the deceased had attacked them with a chopper or knives, and the second accomplice stated that he stabbed the deceased in a self-defence. The third denied knowing that the others had knives.

⁵⁵ *Chan Wing-Siu v. The Queen* [1985] AC168 at 175.

⁵⁶ *ibid.* Sir Robin Cooke at p. 179 said: “Various formulae have been suggested - including a substantial risk, a real risk, a risk that something might well happen. No one formula is exclusively preferable; indeed it may be advantageous in a summing up to use more than one. For the question is not one of semantics. What has to be brought home to the jury is that occasionally a risk may have occurred to an accused’s mind - fleetingly or even causing him some deliberation - but may genuinely have been dismissed by him as altogether negligible.” He also said at p. 179: “If they think (the jury) there is a reasonable possibility that the case is in that class, taking the risk should not make that accused a party to such a crime of intention as murder or wounding with intent to cause grievous bodily harm. The judge is entitled to warn the jury to be cautious before reaching that conclusion; but the law can do no more by way of definition; it can only be for the jury to determine any issue of that kind on the facts of the particular case.”

interpretation of this suggests that it is enough to establish the guilt of the secondary party in a collateral offence by connecting or proving that the accessory contemplated the committing of the offence; there is no need to find out if there was an express or tacit agreement between the accomplices. This plainly means that the court has made both tests of primary and additional offences the same and this would be true if we assume that only knowledge is the current state of mind required to establish the liability of the secondary party. Moreover, such movement toward proving an easier mens rea would be welcomed by the prosecution rather than trying to prove the agreement or authorisation as stated earlier. However, Sir Robin Cooke himself has complicated all of this when he said:

“That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.”⁵⁷

Accordingly, Cooke has proposed that both contemplation and authorisation are combined, and are identical. In fact, this is not true for a couple of reasons: First, linguistically there are different. Contemplation means the act of thinking deeply and quietly, while authorisation, involves the notion of giving permission to or for.⁵⁸ Secondly, ordinary language would not treat the two concepts alike, and if it came before a legal examiner, he would assume that there is a difference.⁵⁹ Why did Sir

⁵⁷ *Chan Wing-Siu v. The Queen* [1985] AC168 at 175.

⁵⁸ Longman Dictionary of Contemporary English (1992), London: Longman. p. 59 and 220.

⁵⁹ Giles, M., “Complicity: The Problems of Joint Enterprise” [1990] *Crim. LR* 383 at 385. She says: “This statement uses both authorisation and contemplation. There is of course a difference between them; contemplation incorporates the wider principle of recognition of a possible future mens rea, while authorisation implies more strongly narrower principle of joint conditional intent, because it

Robin Cooke make such statement? Did he think that the test of mens rea has been always based on foresight? Alternatively, is there any further reason for such analyses? After following Cooke's statements, it occurs to me that he noticed that the question in this case is a new issue in English law.⁶⁰

The decision of *Chan Wing-Siu* was approved in English law in *R v. Ward* (1986).⁶¹

English law now faces two tests of liability: *Agreement* and *Foresight*, which creates some problems if both are adopted. One example of this is when the accessory contemplates that the principal might over act or may go too far. However, he might honestly wish that the principal will not act in this way, or directly informs him that overacting is not accepted. This somehow would stop the concept of express/ tacit agreement between the parties from being the basis of an accessory's guilt. Should the accessory escape guilt in this example, although he decides to continue in the project?

If only the agreement test is adopted, then the accessory might benefit from a defence that the extra offence is outside the original common purpose. This sounds

suggests some communication on the matter enterprise, either express or implied, between the parties."

She later tries to find some reasons for the adoption of contemplation:

1- "Not allowing morally culpable accessory to escape liability." But what does morality mean? Does contemplation amount to intending a consequence? Another consideration is that the accessory might dismiss the thought that the principal would commit the other offence. How can it be identified?

2. "the interests of justice are finely balanced" but the commentator himself says:

"The maximum penalty for the principal and the accessory is the same...To find an accessory liable for murder on the wider principle, where there is no express or implied authorisation to the principal, is something at which the court may balk, knowing that life sentence is inevitable." *ibid.* pp. 386-7.

The English Draft Criminal Code 1989 adopts contemplation in cl. 27. (1): "a person is guilty of an offence as an accessory if; c) he intends that the principal shall act or is aware that he is or may be acting or that he may act with the fault (if any) required for the offence."

⁶⁰ Sir Robin Cooke said: "In England, it appears not to have been found necessary hitherto to analyse more elaborately the test, which the jury have to apply. But, in association with the modern emphasis on subjective tests of criminal guilt, the matter has been examined by appellate courts in Australia and New Zealand." *Chan Wing-Siu v. The Queen* [1985] AC168 at 176.

reasonable where it stresses the fact that the accessory does not accept the occurrence of that additional result, which is, by the same token, negative as to the issue of agreement. However, there is a difficulty if he continues with the joint enterprise, especially where he realises that there is a risk that the principal might commit an additional offence. The accessory here might claim that he did not consider the risk a serious one in nature and that is why he decided to go ahead with the criminal project.

On the other hand, crime prevention consideration might press the courts to adopt a test other than that of agreement. Thus, when a man lends himself to a criminal enterprise knowing it involves the possession of potentially murderous weapons which are used by his accomplice, public policy requires that he should not escape the consequences of their conduct by reliance upon prior agreement.⁶² Accordingly, what is the situation in case law? How can English law operate two different concepts simultaneously?

In *R v. Slack* (1989)⁶³ the Court of Appeal held that:

⁶¹ *R v. Ward* [1986] 85 Cr. App. Rep. 71.

⁶² *Chan Wing-Siu v. The Queen* [1985] AC168 at 172.

⁶³ *R v. Slack* [1989] Q.B. 775. The direction made by the Crown Court was that the jury, if they found that the appellant engaged in burglary, contemplated and foresaw the principal committing the addition crime of murder, they should convict. This in fact, is similar to what the court in *Chan Wing-Siu* had said. The important point of the appeal, for the defence, was that the judge misdirected the jury in his direction on murder by equating foresight and contemplation with intent. The defence indicated that the direction was wrong in law and that it did not accord with decision and commentary on the subject, making reference to *R v. Hyam* [1975] AC 55; *R v. Moloney* [1985] AC 905; *R v. Hancock* [1986] AC 455; *R v. Nedrick* [1986] 1 W.L.R. 1025, arguing that foresight is merely evidence of intent and that the jury must be directed to it in accordance with such cases. The defence did not argue for the authority or agreement test; it would have been different if they did so. *Slack* *ibid.* pp. 776-777. On the other hand, the prosecution at p. 777, argued that the governing law of complicity regarding the situation of common purpose is to be found in *Chan Wing-Siu v. The Queen* [1985] AC 168 which was confirmed by the Court of Appeal in *R v. Ward*, [1986] 85 Cr. App. Rep.

“ on a trial for murder in the case of a joint enterprise, proof was necessary that the principal party intended to kill or do serious harm at the time he killed; that, albeit the secondary party was not present at the killing or did not know that the principal party had killed or hoped that he would not kill or do serious injury, nevertheless the secondary party was guilty of murder if, as part of their joint plan, it was understood between them expressly or tacitly that, if necessary, one of them would kill or do serious harm as part of their common enterprise; that the precise form of words used in directing the jury was unimportant provided that it was made clear to them that, for the secondary party to be guilty, he had to be proved to have lent himself to a criminal enterprise involving the infliction, if necessary, of serious harm or death or to have had an express or tacit understanding with the principal party that such harm or death should, if necessary be inflicted, and that accordingly, the appeal would be dismissed, for the direction made clear to the jury that for them to find the appellant guilty as secondary party they had to find that he must have at least tacitly agreed that, if necessary, serious harm should be done to the occupant or that he had lent himself to the infliction of such harm and there was ample evidence on which the jury could conclude that the prosecution had satisfied them so as to be sure on those matters so far as concerned the appellant.”⁶⁴

One might assume that the Court of Appeal in this case returned to the agreement test. This may be true, but an intensive analysis shows that the Court of Appeal was not clear about its position. This is because the reason of appeal was that the Crown Court used the test of foresight alone. Why did the Appeal dismiss the case here? The Law Commission Paper No.131, clearly points out that:

“Although this judgement [*Slack*] refers a number of times to the need for an agreement, it is summarised in the headnote as requiring an ‘understanding’ on the part of the defendant that the collateral crime would take place: a position ambiguous between foresight and authorisation.”⁶⁵

71. Also, it said that cases of deciding the general requirement of mens rea, such as *Hancock* and *Nedrick* only apply the issue of intention in the principal liability and it is unsuitable for accessories. This appears to be taken 1997 by the House of Lords in *R v. Powell*; *R v. English* [1998] 1 Cr. App. Rep. 261 which confirms that intention in the doctrine of complicity is not governed by precedents for the general requirements relating to mental element.

⁶⁴ On what the proper direction should be, Lord Lane C.J said: “As appears from the cases we have cited, the direction may be in a variety of different forms. Provided that it is made clear to the jury that B to be guilty must be proved to have lent himself to a criminal enterprise involving the infliction, if necessary, of serious harm or death or to have had an express or tacit understanding with A that such harm or death should, if necessary, be inflicted, the precise form of words in which the jury are directed is not important.” *Slack op cit.*, p. 781.

⁶⁵ LC. No. 131 *op cit.*, p. 60.

Did the Court of Appeal want to invoke a new concept of ‘understanding’? However, it seems that there was nothing in the case to suggest such a proposal but it might be true to point out that the Court found a problem in dealing with two broad concepts in one issue. Perhaps the Court tried to extend the concept of tacit agreement to become closer to the concept of contemplation. It might be a neighbouring term, but it clearly is not identical, and no one said that understanding is to be considered as a third term in this field of liability with agreement and contemplation.

The House of Lords and *Powell; English* Principle:

In 1997 the House of Lords had to decide two separate criminal appeals regarding the issue of an accessory’s foresight of the principal committing the additional offence in their joint enterprise. The case in which this arose was *R v. Powell; R v. English*.⁶⁶

In the first case (Powell’s case), P and D went with another to buy drugs from a drug dealer. They said that the third man shot the drug dealer when he came to the door. They were convicted of murder although it was not known which one was the principal. The Crown Court based its conviction upon proof that P and D knew that the other man had a gun with him and that he might use it to kill or to cause serious harm to the victim. After dismissing their appeal in the Appeal Court, the case went to the House of Lords.

In the second case (English's case), E appealed against the decision of the Appeal Court to dismiss his appeal against conviction of the murder of a police man who had been stabbed by W with a knife, although both E and W were attacking the victim with wooden posts. E said that he did not have knowledge of the knife. The judge had directed the jury according to the issue of contemplation, and that they have to consider that E contemplated that W might cause serious injury with the wooden post despite the fact that E did not have knowledge that W had a knife.

The House dismissed the appeal of P and D, but allowed the appeal by E, on a number of grounds:

Firstly, where there was a joint enterprise to commit a crime, it was enough to found a conviction for murder that the secondary party contemplated that the primary party might kill with intent to do so or to cause really serious injury, which means requiring a lower mental state for accessories than principals, and this is specially directed to give effective protection to the public from criminal gangs. Secondly, if the principal committed an act which was fundamentally different from that which they jointly contemplated, and the accessory did not foresee it, then he is not be guilty of murder unless the weapon used was just as dangerous as that which was contemplated.⁶⁷

The consequences of the decision:

⁶⁶ *R v. Powell; R v. English* [1998] 1 Cr. App. Rep. 261; Times, October 31, 1997; Clarkson, C. M., "Complicity, *Powell* and Manslaughter" [August 1998] *Crim. LR* 556.

⁶⁷ *R v. Powell; R v. English* [1998] 1 Cr. App. Rep. 261 pp. 261-2.

The ruling in *Powell; English* is very important as it is a House of Lords decision and brings light to bear on problems in the doctrine of common purpose. The consequences of the ruling are:

1- The decision declares a distinction between principals and accessories regarding the general requirements of mens rea:

One of arguments that the defence brought was that the House should discuss the requirements of intention that *Moloney*, *Hancock* and *Nedrick* required. In a direct answer to the claim Lord Steyn, surprisingly, said:

“Those decisions distinguish between foresight and intention and require in the case of murder proof of intention to kill or to cause serious bodily injury. But those decisions were intended to apply to a primary offender only. The liability of accessories was not in issue. Plainly, the House did not intend in those decisions to examine or pronounce on the accessory principle. The resort to authority must therefore fail.”⁶⁸

This is in fact a *ratio decidendi* because it was an answer to a defence argument. This would stop lawyers from arguing on this point but at the same time creates some ambiguity as to what intention means in the liability of accessories. The House tried to avoid this, but why? One direct answer would be that it is because of the term knowledge, which settles the issue of accessorial mens rea. Moreover it concludes that the mens rea required for accessories is lower than what would have to be proved in relation to principal offenders.⁶⁹

⁶⁸ *ibid.* p. 267. Latter in *Woollin* (1998) Lord Steyn went further by deciding that oblique intention under the above cases is related only to the crime of murder. See chapter 3.

⁶⁹ *Powell; English* at p. 268.

2- The decision emphasises the subjective element in mens rea required for accessories:

The House declares its sympathy with the criteria of contemplation to be the subjective standard required to govern the issue of mens rea in the liability of common purpose.

Lord Steyn stated that:

“The established principle is that a secondary party to a criminal enterprise may be criminally liable for a greater criminal offence committed by the primary offender of a type which the former foresaw but did not necessarily intend. The criminal culpability lies in participating in the criminal enterprise with that foresight. Foresight and intention are not synonymous terms. But foresight is a necessary and sufficient ground of the liability of accessories. This how law has been stated in... *Chan wing-siu v. R* (1985) & *Hui Chi-Ming* (1992).... John Smith has recently concluded that there is no doubt that this represents English Law.”⁷⁰

It seems to be that there are two major reasons for moving to contemplation rather than express/tacit agreement: First, there is one major problem with the agreement test, which is, for example, if one party contemplates that the primary offender might commit a further crime which is not within the agreement. However, the accessory here might frankly wish that the principal will not so act or directly inform him that going beyond the agreement is not accepted. The court said that such a person deserves to be punished, and surely his culpability cannot be based upon the

⁷⁰ Lord Steyn in *Powell; English* pp. 266-7; Lord Hutton, at p. 282; Smith, J.C., “Criminal liability of Accessories: Law and Law Reform” *op. cit.*, p. 464, who explains how the principle applies in the case of murder: “Nevertheless, as the critics point out it is enough that the accessory is reckless, whereas, in the case of the principal, intention must be proved. Recklessness whether death be caused is a sufficient *mens rea* for a principal offender in manslaughter, but not murder. The accessory to murder, however, must be proved to have been reckless, not merely whether death might be caused, but whether murder might be committed: he must have been aware, not merely that death or grievous bodily harm might be caused, but that it might be caused intentionally, by a person whom he was

agreement test because there would be no agreement in this example. If this was the case, the accessory is entitled to a defence here. However, because the accessory continues his association with the joint enterprise, in spite of the risk he had realised, the criminal system is willing to convict him. For this reason, the standard of culpability must move to another criterion, which is contemplation or any word corresponding to it.

Secondly, the House of Lords revealed that steps must be taken to control crime and criminal gangs, and one way of doing this is to adopt a flexible standard of contemplation in this type of responsibility.⁷¹ Besides, although the discussion of this case is related to the crime of murder, the court expressed its opinion that there is no special rule that governs the attitude of accessories in the offence of murder, but that this subjective principle applies to their involvement in most criminal offences.⁷²

All of the three judges expressed their formal agreement, and directly supported the ruling which establish the principle of contemplation, in the liability of common purpose cases, derived from *Chan Wing-Siu*. This principle is now called the '*Chang Wing Siu /Powell; English principle*'.⁷³ I shall discuss below the judges expressed view to the matter regarding this form of liability, to find what lay behind their approach.

assisting or encouraging to commit a crime. Recklessness whether murder be committed is different from, and more serious than recklessness whether death be caused by an accident."

⁷¹ *Powell; English* at pp. 268- 9; *Chan Wing- Siu v. R.* (1985) 80 Cr. App. Rep. 117 at 172, 282; Williams, G., *Criminal Law: The General Part* (2nd ed. 1961), London. p. 397 where he says: "It seems that a common intent to threaten violence is equivalent to a common intent to use violence, for one so easily leads to the other."

⁷² Lord Steyn in *Powell; English* at 266.

⁷³ Smith, J.C., "Commentary on *R v. Reardon*", (May 1999) *Crim. LR* 392 at 393.

Lord Mustill supported the final ruling, and mentioned the difficulties of adopting the agreement test, in which some accessories would escape conviction when they are morally responsible. However, in a surprising statement, he stated that to control the issue of mens rea in common purpose cases there are two options: (1) To abandon the principle of express/tacit agreement, and to adopt the formula of contemplation only. (2) To keep the latter operating this in field of liability in the majority of cases, and only exceptionally and in a minority of cases should there be applied the test of foreseeability as indicated by Sir Robin Cooke in *Chan Wing Siu*. Lord Mustill stated that he supports the second option.⁷⁴

There has not been a single case that clearly indicates that both formulas be applied, simply because they are different in their function. Another point is that Lord Mustill suggests this new dual function but does not bring proper justification. For example, what distinguishes the majority of cases and the minority? For the first he cites the agreement test while for the second he requires the contemplation method. What would happen when the accessory fails to prove the details of his express/tacit agreement with the principal? Should the judge move the case towards the test of foreseeability? There is some doubt, and according to one of the primary principles of criminal law, the defendant should have the benefit of the doubt.

Both Lord Steyn and Lord Hutton have expressed their willingness to rely on the contemplation test, which was used in *Chan Wing Siu*, and emphasised its

importance because the contemplation criteria presents itself as the current formula in the liability of joint enterprise in English criminal law.⁷⁵

However, there was some ambiguity in dealing with second case (the English's case). The Crown Court directed the jury on the principle stated by the Court of Appeal in *Hyde* (1991), which in fact is the same as the contemplation test of *Chan Wing-Siu* and its supporting cases.⁷⁶ The defendant, English, had received an acquittal from the House of Lords because there was no evidence to indicate that he had knowledge of the knife used by his principal W, even though he was at least contemplating that W would cause the victim serious bodily harm with the wooden sticks they had. Surprisingly, that sort of foreseeability is sufficient to charge E with being an accessory to murder; but the House of Lords did not find this point relevant, and neither did the prosecution. Many would take the view that the weight of authority would support a conviction rather than an acquittal on the grounds that E had contemplated the committing of the principal offence, and this is the main thread of the contemplation test. However, the House wished to declare that the issue of

⁷⁴ Lord Mustill in *Powell; English* at pp. 264 – 6.

⁷⁵ *ibid.* pp. 266-287. Lord Hutton said: "The first issue is what is the degree of foresight is required to impose liability under the principle stated in *Chan Wing-Siu*... On this issue I am in respectful agreement with the judgement of the Privy Council in that case that the secondary party is subject to criminal liability if he contemplated the act causing death as a possible incident of the joint venture, unless the risk was so remote that the jury take the view that the secondary party genuinely dismissed it as altogether negligible." *ibid.* pp. 286

⁷⁶ *Hyde* [1991] 92 Cr. App. Rep. 131, [1991] 1 Q.B. 134. The House of Lords, in *Powell; English*, stated that: "The problem raised by the second certified question is that, if a jury is directed in the terms stated in *Hyde*, without any qualification (as was the jury in *English*), there will be liability for murder on the part of the secondary party if he foresees the possibility that the other party in the criminal venture will cause really serious harm by kicking or striking a blow with a wooden post, but the other party suddenly produces a knife or a gun, which the secondary party did not know he was carrying, and kills the victim with it." p. 283.

weapons is relevant in determining the scope of mens rea in this form of liability.

Lord Hutton expressed the following view:

“However, I would wish to make this observation: if the weapon used by the primary offender is different to, but as dangerous as, the weapon which is the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill, or vice versa.”⁷⁷

In general, this case shifts the issue of mens rea of accessorial liability, in the additional offence committed by the principal, to contemplation rather than express/tacit agreement. This suggests that if a party contemplates that the primary offender might commit a further crime which is not within the agreement, the accessory is responsible, provided that he contemplates such an offence. The reason for this is that when the accessory continues his association with the joint enterprise, in spite of the risk he had realised, the criminal system is willing to convict him for this unsociable behaviour but this case causes some uncertainty. For example, Lord Hutton, although expressing the importance of foresight as being the proper test in this type of liability, does not rule out the possibility of using the express/ tacit agreement beside the contemplation.⁷⁸ Apart from this, one should note that *Powell*;

⁷⁷ Lord Hutton in *Powell; English*, p. 286.

⁷⁸ Lord Hutton said: “the test of foresight is the proper one to apply. I consider that the test of foresight is a simpler and more practicable test for the jury to apply than the test of whether the act causing the death goes beyond what had been tacitly agreed as part of the joint enterprise. Therefore, in cases where an issue arises as whether an action was within the scope of the joint venture, I would suggest that it might be preferable for the trial judge in charging a jury to base his direction on the test of foresight rather than the test set out in the first passage in *Anderson and Morris*. But in a case where, although the secondary party may have foreseen grievous bodily harm, he may not have foreseen the use of the weapon employed by the primary party or the manner which the primary party acted, the trial judge should qualify the test stated in *Hyde*... in the manner stated by Lord Parker in the second passage in *Anderson and Morris*.” Lord Hutton in *Powell; English*, p. 287. Although the general assumption of this case stresses the fact that English law is heading towards contemplation or foresight as the required criteria to decide the liability of accessories in the collateral offence, in fact, the above direction is, rather, a complication of the whole issue by returning the criteria of common design, or tacit/express agreement as it was in *Anderson and Morris*. It is not clear whether the above

English presumably acted in line with the English Draft Criminal Code, which suggests that any future codification of criminal complicity should take this into consideration.⁷⁹

statement is related to the crime of murder or another crime or crimes. This surprising statement shows how much uncertainty surrounds criminal complicity and how pressing is the need for codification. I think that this part is not in coherence with the case's final conclusion that the focus is to see whether or not the accessory contemplated the additional offence which should represent the law in this regard.

⁷⁹ Clause 27 adopts contemplation. It states that: “(1) A person is guilty of an offence as an accessory if; c) he intends that the principal shall act or is aware that he is or may be acting or that he may act with the fault (if any) required for the offence.” English Draft Criminal Code 1989. See the team commentary in Vol. 2, paragraph 9.28, p. 208.

UAE Law

Under the F.P.C. an accessory instigates, conspires, or assists a crime if he shares the intention and knowledge of the principal offender. However, not every crime or plan achieves its desired end. There might be unexpected results or unwanted outcomes that never came under the consideration of the accomplices. The following section examines this issue under UAE criminal law.

Historical background

The situation under the domestic codes of the Emirates is as follows: The Dubai Penal Code for 1970, in article (32), states that:

“The liability of common purpose:

When two or more persons agree to commit illegal participation, and an offence or more resulted from such association, every present party at its commission is liable, provided that the offence is an expected result from the primary aim.”

Article (33) goes on to asserts that:

“If a person instigates; incites another to commit a crime, and the other commits it in accordance with such instigation or incitement, it does not matter whether that crime is the aim of instigation; incitement or any other crime...provided that the crime is an expected outcome of the instigation or incitement.”

These articles of the Dubai Code are incoherent, ambiguous, and lack appropriate wording. This is owing to several reasons. Although article (32) expressly uses the term ‘common purpose’, as indicated by English law, surprisingly the article omits to include the category of assistance, and only refers to agreement of conspiracy. This

by no means would suggest that the Code intended to exclude aiding from the ambit of the unexpected result or the additional offence, since there is no a clear assumption for such elimination. In addition, according to this article, only the present party is liable and he has to be a conspirator. However, as it is commonly acknowledged, assistance has many roles to plays other than conspiracy. The aiding party might be present or absent, while in many examples the conspiring party may not be present. This suggests that there was a mistake in using the appropriate words in describing the categories of accessories regarding the liability of the additional offence of the principal offender. To avoid this, the Dubai Code in article (33) indicates that instigators are liable whether absent or present, but, as mentioned before, this is a separate type of liability from accessorial liability under the Dubai Code. Another point is that the Code used the term *expected result*. There is not much guidance given to the true meaning of such a term, which links the accessories' involvement with an unexpected or unwanted result.

By contrast, the Abu-Dhabi Penal Code was almost silent regarding this connection except that in very general words linking the inchoate liability of instigation to the different crimes committed by the principal without indicating that such crimes must be an expected result of the instigation, as was indicated by the Dubai Criminal Code.⁸⁰ In comparison with the Dubai Code, the Abu-Dhabi Penal Code is very

⁸⁰ See articles (15, 16, 17) of the Abu Dhabi Penal Code. A. Mahdi indicates: "The instigator is liable for the different crime if it is a possible consequence of his instigation. However, the Abu Dhabi Penal Code does not expressly state such condition... but I believe that the liability of the instigator demands that the additional crime has to be a probable consequence of the instigation. This is supported by article (16) of the Abu Dhabi Penal Code, which indicates that the instigator is responsible for the principal crime if it is committed as consequence of the instigation. This situation is the same in both Latin and Anglo-Saxon criminal system." Mahdi, A., *Sharh Alquaed Alama le Qanon Alokobat: Dirash Muqarana bean Qanon Alemarat Alarbia Almutheda (Abu Dhabi, Dubai, wa*

limited in some aspects, and very broad in others. However, both Codes failed to produce a coherent response to the issue of collateral offence in accessorial liability, as they omit to give a whole evaluation of this problematic liability. One example of this is the issue of 'subjective versus objective': should the accessories be judged upon their real contemplation, or imputed assumption? In other words, do the accessories need to contemplate the result, and on what level is this required virtual certainty, probability, or possibility? Or the expectation is linked to either the reasonable man experiment or the probable test which indicates what crime is a probable outcome of the other. Nothing in the Codes clarifies any of these doubts.

One might argue that since these Codes are influenced by the Indian-English legal tradition, the answer is to be found in those legal systems, especially in English law. However, this suggestion is uncertain regarding this type of liability, because as it was indicated earlier, the issue of 'subjective versus objective' was not settled in English law until the nineteenth century and leaned more towards the subjective. Moreover, as appears in almost all commentaries of Arabic jurists, a mistake is made in declaring that English law follows the test of probability which sets certain crimes to be probable of others as it was suggested by Foster and Stephen.⁸¹ I have already mentioned that this is not true, but it is difficult to convince Arabic jurists, who greatly influence judicial opinion. Although this part of the UAE domestic codes is

Mashrua Alqanon Alithadi) wa Alqanon Almassri (Arabic. *Explanation of the General Rules of the Penal Law: A Comparative Study between UAE Laws (Abu Dhabi, Dubai, and the Draft Federal Penal Code) and the Egyptian Law*) (1983), Cairo: Atlas Publication. pp. 416-7.

⁸¹ See for example: Husni, M., *Almushraka Aligramia fee Altashreat Alarabia*, (Arabic. *Criminal Complicity in Arab Codes*) (2nd ed. 1992), Egypt: Dar Alnhda Alarabia. pp. 459-461463. Cf. Sorror, A., *Alwaseet fee Qanon Alokobat: Alkesm Alam*, (Arabic. *Explanation of Penal Code: The General Part*) (6th ed. 1986), Egypt: Dar Alnhda Alarabia. p. 463; Al Shinaway, S., *Alnadaria Alama*

not applicable now, this inaccuracy should be cleared because basically it is contrary to the true position of legal history of English law, and more importantly, as some might suggest, the current situation of this test of probability has a foundation in a great system like English law. This might be taken to justify the application of the probable test in Arabic jurisprudence.

The current situation:

The issue of the probable result or additional offence is totally dominated by the F.P.C, article (51) of which provides that:

“An accomplice (co-principal and accessory by causation) to an offence shall receive the penalty of the offence which has been committed, notwithstanding that it is different from that intended to be committed, whenever the offence which took place is a probable result of the participation.”

Accordingly, in the UAE, the F.P.C. departs from the presumed requirement that there must be a coincidence of both of the accomplices' acts and the mental element in the primary offence. For liability in respect of the additional offence, committed as a consequence of the central crime, only the principal has to satisfy the *actus reus* and *mens rea* requirements of that collateral offence. By contrast, other accomplices such as co-principals and present or absent accessories are judged by an exceptional form of liability, which links their guilt to crimes outside the scope of their agreement to a notion called *the probable consequence test* (an Arabic reference to the liability of common purpose or additional offence). This test of probability indicates that if a person commits the action of instigation, conspiracy, assistance and

fee Algarema wal Alikab fee Qanon Alokobat Al Kuwaiti, (Arabic. *The General Theory of Crime and*

the principal commits a crime different to what the accessories wanted, but likely to be caused by such action, then that person is an accessory to the latter crime of the principal offender.⁸² It is useful to mention that article (51) of the F.P.C. was taken from article (43) of the Egyptian Penal Code with one sole exception: the Egyptian Code only binds the probable test to accessories. However, Egyptian judicial and some scholarly opinion now make the same requirement as that made by the F.P.C.⁸³ Further, it is worth bearing in mind that the F.P.C. prefers the objective basis of liability as it is understood from the words of article 51, but it lacks a direct indication to which objective foundation it requests such as objective recklessness evaluated by the notion of an ordinary person or just pre-determining that certain crimes are a probable result of another.

Arabic commentary indicates that this type of liability has two aspects: first, the liability of the accessory for a less serious offence than that which had been agreed upon, and second, liability for more serious offences.⁸⁴ The principal offender might commit a crime less serious than the original crime, in which he shares intention and knowledge with the secondary offender. For example, in murder, an accessory might instigate the killing, but the perpetrator commits a minor assault or an attempted murder. In another example, a principal may be assisted in bringing about a murder, but he commits theft or causes damage to the property of the victim. In these

Punishment in Kuwait Penal Code) (2nd ed.1992) p. 674.

⁸² The Arabic jurisprudence do not use the current vocabulary of accessorial liability employed by English law for additional offences such as the terms of common purpose; joint enterprise; common design; common pursuit; and the liability of unintended consequences. The only terms used are the liability of more serious offence, and the liability for the probable result or consequence.

⁸³ Article (43) of the Egyptian Penal Code indicates that: "Who participated in a crime even if it was not deliberately committed, is responsible for the crime that is actually committed, if it is a probable result of provided instigation, conspiracy or assistance."

situations a question may arise about whether an accomplice could be charged with crimes he never wanted to occur.⁸⁵ Arabic Codes comprise different views towards this aspect of liability. Some do not expressly state the position of the law in this regard, and leave the task to general principles of the criminal responsibility. Others take the opposite view by imposing express provision, which indicates an exceptional move of those general principles.⁸⁶

Elements of accessorial guilt regarding the additional offence:

There are two elements required to establish accessorial guilt in respect of the additional offence. Firstly, there must be proof that the accessory was engaged with the principal offender in the primary crime, and secondly, the additional offence has to be a probable consequence of the primary offence in which there has been accessorial participation. These elements are discussed below.⁸⁷

⁸⁴ Sorror, A., *op. cit.*, pp. 461-2; Mahdi, A., *op. cit.*, pp. 399-400.

⁸⁵ Husni, M., (Arabic. *Criminal Complicity*) *op. cit.*, pp. 447-8.

⁸⁶ Lebanese, Syrian and Jordanian Penal Codes do not provide direct answers to these problems, which take the same position as the French and the German Penal Codes. Under these codes, accessorial liability has to be estimated from general rules, which requires intention. For example, Husni indicates: "It is not difficult to refer to the general principles in criminal responsibility to solve this problem and apply these principles if the legislator does not impose a provision to affirm how they should be worked out, and when some codes do not include such articles, it becomes inevitable that the general principles will be applied... This means that the responsibility of the accessories in relation to the more serious offences is exactly like that of the liability of principal offender. The accessory is not responsible for the crime unless these similar elements are proved: ...the criminal intention is required, if it is not available then the mental element of the accessory is not established. Accordingly, criminal intention affirms the boundary accessorial responsibility." Husni, M., (Arabic. *Criminal Complicity*) *op. cit.*, pp. 450-3; See also: Al-Saeed, K., *Almbadee Alama le Amusharka Aligramia fee Qanon Alokobat Alordony*, (Arabic. *The General Provisions of Criminal Complicity in Jordan Penal Code*) (1983) Jordan: Majedlawy Publication. p. 62; Alia, S., *Sharh Qanon Alokobat: Alkesm Alam* (Arabic. *Explanation of the Penal Code: The General Part*) (1998), Beirut. p. 331.

⁸⁷ Rabia, H., *Sharh Alquaed Alama le Qanon Okobat Alemarat Alarbia Almutheda: Alguza Alawal, Almbadee Alama le Aljarima*, (Arabic. *Explanation of the General Part of UAE Penal Code: Part One, The General Principles of Crime*) (1993), Dubai: Albayan Press. p. 442-3.

1) Proof of accessorial involvement in the primary offence:

This condition, sometimes referred in Arabic as *the availability of participation elements*, seems to be an obvious requirement and need not to be expressly indicated since accessorial liability of the additional offence is connected with the accessorial involvement in the primary offence, which by the same token indicates that both primary and additional liability are judged by a single doctrine. However, since almost all Arabic legal commentary takes this as the starting element, it is important to discuss this requirement. Thus, the prosecution first has to prove that the accessory involvement satisfies the requested elements of accessorial liability. These are instigating, assisting or conspiring with the principal, (properly) sharing with the principal his state of mind (intention), and finally that there is some form of causation in the accessory's involvement and that the principal offender commits the crime or at least attempts to do so. For example, Husni states that:

“If this element is not fulfilled, as for example the accessorial action were legal in its nature, but a crime is committed because of it and it was a probable result of this instigation, agreement or the help, given, the person is not responsible in the eyes of the law for the crime committed by the principal... In application to that, if someone asks someone else to forbid another person to entering a building, and the other commits a murder, the person who gave the order is not responsible for the murder, even though it was a probable result of the order.”⁸⁸

The Egyptian Court of Cassation provides an example of such requirement in a case in which a person had asked another to obtain a passport of a nationality other than his own. The principal, without the knowledge of the first person, forged the documents required and obtained a forged passport. The Court said that the

agreement was not to commit forgery of which the counterfeited passport was the result, and that providing a passport to a non-entitled person does not necessarily require committing forgery.⁸⁹ Implicitly then, the Court seems to suggest that the prosecution, and minor courts, must establish the general requirements of accessorial liability before proceeding with accessorial involvement in the additional offence.⁹⁰

2) The additional crimes have to be a probable consequence of the accessorial actions:

This condition requires that the additional crime, which is committed as a result of the joint enterprise, has to be a probable consequence of the accessorial action of instigation, conspiracy, or assistance given to the principal to commit the primary crime, even though, the latter crime was not an expected outcome by the accomplices.

The test of probable result means that an accessory is liable for any crime, which in the ordinary course of things was a natural and probable consequence of the original crime of participation.⁹¹ According to Bhanam, this test is evaluated from general experience and knowledge of things, or common sense.⁹² However, is this announcing of 'common sense' enough to justify criminal responsibility? It is only a

⁸⁸ Husni, M., (Arabic. *Criminal Complicity*) *op. cit.*, pp. 466-7; Sorrow, A., *op. cit.*, p. 464.

⁸⁹ Egyptian Cassation Court Case No. 47 for 1930, Y. 2 p. 40. *Majmuat Ahka'am Mahkama'at Alnaqad* (Arabic. *Decisions of the Egyptian Cassation Court*), Egypt.

⁹⁰ Husni, M., (Arabic. *Criminal Complicity*) *op. cit.*, p. 467.

⁹¹ According to this test, the accessory is responsible for such probable crimes even though it was not intended nor foreseen. See: Robinson, P. H., "Imputed Criminal Liability" (March 1984) *The Yale Law Journal* Vol. 93, No. 4. 609.; Zuhair, N.A.A., *Almasualia Aljinaia Almufirda*, (Arabic. *Imputed Criminal Responsibility*) unpublished Ph.D. thesis, The University of Cairo. *nd*.

⁹² Bhanam, R., *Alnadaria Alama le Alqanon Aljenai*, (Arabic. *The General Doctrine of Criminal Law*) (1995), Egypt: Almareaf Publication. p. 699.

broad justification and is strongly objected to by some legal commentary. For example, Alan Gledhill indicates that criminal codes must be comprehensive, and strictly construed. He says that referring to ordinary ideas and common justice is a step to justify something that does not come within the terms of the codes. Hassan Rabia, in his commentary on UAE criminal law, summarises the position of Arabic legal commentary on this test.⁹³ He indicates that the criteria is connected not with what the accomplice actually contemplates but with the imputed conception of the ordinary course of events as indicated by Bhanam. Thus, Rabia lists some crimes indicating which one are a probable result of another. For example, he suggests that murder is a probable resulting crime of criminal damage; rape and killing who might come to rescue the victim in rape, arson is a probable result of theft or burglary but assault and murder are not probable results of corruption or forgery. He ends this by saying that the test is evaluated on its merits and is for the judge to decide. However, such listings do not establish any instrumental criteria for the probable test, and presumably it indicates that, under Arabic legal commentary, accessorial liability in this type of liability is judged on outside the normal requirements of *mens rea*. This opinion is contrary to the English Criminal Justice Act of 1967 in s. 8, which stresses that the court or the jury shall not conclude that the defendant intended or contemplated a result of his action only by it being a natural and probable consequence of such actions. The inference must be directed to all the circumstances of the case.

⁹³ Rabia, H., *op. cit.*, p. 440-3; Bhanam., (1995), *op. cit.*, p. 699.

To return to the view of Bhanam. He finds some of his arguments unsound and tries to limit the criteria of probable consequence. He says that probability should be strong to lead to such conclusion. For instance: C instigates P to rob another person, but P is weak and inexperienced in the use of firearms. Because of this, he hires his friend D, a more able-bodied, to commit the robbery. D commits the crime but kills another person. Here C is not a party to murder although he is a party to robbery because he instigated P to commit a robbery, which had a minor risk of murder, which was committed by D. This is not enough to consider the crime of murder as a probable consequence of the robbery.

It seems an odd view, but by comparison with other Arabic legal commentary, Bhanam's view is unique, and suggests that he gave more thought to the subject than most other commentators.⁹⁴ Having said that, he does not make a strong foundation to his proposed limitation of this harsh test of probability. Should the courts consider this and build up a theory? It is strongly advised that they do, especially the UAE courts, so as to have a balanced opinion in comparison with legal commentary. However, with respect, the opinion of Bhanam regarding the minor risk is still based on that odd notion of probability and any limiting view would not succeed unless it moves to another foundation. This will be discussed later.

⁹⁴ This is not to deny that there is some other worthy opinions, Sorrow, for example, suggests that the probable test is not fixed to a general standard that X is always a probable of Y. He says that such probability is to be discussed in each case. For example, it is not appropriate to indicate that murder is always a probable crime of burglary. However, this comment is said in broad terms without complete investigation of the issue and does not discuss how accessories can escape blame, as Bhanam tried to establish. Sorrow, A., *op. cit.*, pp. 463-4.

It is worthwhile mentioning in this connection some reported cases from Egypt. In the Egyptian Cassation Court in Case No. 204 of 1957, three accomplices entered the victim's house with the purpose of committing burglary. One party fired two shots, which caused the death of the owner; the others tried to steal a cow, but they could not because the victim's son was holding it. They appeared in the Cassation Court and were convicted of murder and attempted burglary.

The Court ruled against the defendants indicating that:

“According to legal commentary, both co-principals and accessories are responsible for the crime committed by the principal offender, even if it was different from the primary one they intended and agreed to commit, because the latter crime was a probable offence of the primary crime.”⁹⁵

The Court failed to value the importance of the issue by avoiding any discussion on how does this test works. Initially it seems difficult to offer a clear view of the thoughts of the court on applying the test of probable result.

In another appeal case from Egypt,⁹⁶ two persons forced a woman to join them in a car in order to rape her. They stopped near a farm, and took her outside the car, and while they were starting to rape her, she screamed loudly, which were heard by two guards nearby. One party used a gun to kill one guard and wounded the other. After dismissing their appeal, they were brought to the Cassation Court and convicted of murder, attempted murder, and attempted rape.

The Cassation Court's opinion was that:

⁹⁵ Egyptian Cassation Court Case No. 204 for October 7th 1957, Y. 8, p. 760. (Arabic. *Decisions of the Egyptian Cassation Court*), Egypt.

⁹⁶ Egyptian Cassation Court Case No. 25 for 1961, Y.12, p. 156. (Arabic. *Decisions of the Egyptian Cassation Court*), Egypt.

“The conviction of the other accomplice (the accessory to murder) was correctly right, notwithstanding he was only driving the car. This is because the ordinary course of events suggest that the felony of murder, and attempt, are a probable consequence of attempted rape, and by common sense those who carry a gun are expected to use it.”

To conclude on this point, it was argued that it would be inappropriate to broadly judge people on the notion of common sense or on the ordinary course of events. It would be better if the Court had discussed the notion of expectation or contemplation when it mentioned at the end that carrying a gun develop a contemplation of committing a more serious offence. The Court did not take that chance, and abstained from delivering a more justified argument. It would have been preferable if the Court had tried to link guilt to the ‘ordinary man’ test, which suggests that the court is obliged to examine the whole case instead of indicating that X is a probable consequence of Y and *vice-versa*. This failure to deliver a clear verdict as to how the probable test operates is possibly due to an earlier decision of the Egyptian Court in 1940, when it established a dictum regarding this connection by indicating that:

“The accessory must legally expect all the probable and logical results, which logically and normally occurs from his involvement from the fact that he wanted to contribute in its commitment.”⁹⁷

Accordingly, a person is assumed to contemplate all the probable results of his action, although he could not have knowledge of such results. The harshness and the vagueness of the probability test here shows a conflict in finding a clear foundation of guilt, which reflects a struggle to understand the whole subject. The inadequacy of the opinion of the Egyptian Cassation Court is demonstrated by the fact that the most serious crime is considered to be a probable result of another of like nature. How

does the probability test actually operate? What defences can accessories claim? Does the Arabic jurisprudence justify the blaming of accessories for additional offences?

In the Egyptian Cassation Court case No. 111 for 1965,⁹⁸ a watchman, A, joined others in burgling a store belonging to the company for which he worked. The accomplices tied up the night watchman, B, who was a colleague of A. The parties managed to steal what they wanted, and took to the cars waiting outside. However, A, thinking that B might testify against him, acted separately by killing B with a gun. The Cassation Court convicted all accomplices of burglary and murder in spite of the fact that the killing of B was outside the original plan of burglary, and despite the fact that A had acted individually. The Court was satisfied that the test of probable consequence asserted that murder is a likely consequence of burglary, and all accomplices must be responsible. This decision is consistent with a previous decision of the court, which indicated that the probable test is to be identified from general experience and knowledge of life as was argued earlier by Bhanam. Apparently Arabic view of commentary and courts list offences as being a probable consequence of others and *vice-versa*. However it does not enumerate the criteria by which any clear principle can be identified or established. For example, the Egyptian Court of

⁹⁷ Egyptian Cassation Court Case No. 180 for 8 January 1940, Y. 3, p. 234. (Arabic. *Decisions of the Egyptian Cassation Court*), Egypt.

⁹⁸ Case No. 111 for June 7th 1965, Y. 16, p. 556; Case No. 167 for November 20th 1978, Y. 29 p. 809, similarly the Court ruled that the offence of murder is a probable consequence of burglary. (Arabic. *Decisions of the Egyptian Cassation Court*), Egypt.

Cassation has illustrated that murder is considered as a probable result of the burglary. It said:

“If someone has agreed with others to break in to another person’s house, the Court, according to the test of probable consequence assumes that the accomplices contemplate or ought to contemplate that the victim will be awake and would try to defend, and logically they would try to stop him by killing him and not in another way. This is known as a chain of events, and who was involved in the first instance, in theft, the law makes him responsible for the final event of murder, because it is a probable result of the first.”⁹⁹

Most Arabic legal commentary indicates that murder is considered a probable result of theft or damage, which is also considered as a probable result to participation in assault, but insult or rape is not a probable result of theft or damage. In the UAE, the issue is not totally clear. However, there is one important case, which is examined below.

The ‘Capri-Sun’ Case’:¹⁰⁰

This case is commonly known by the name of the soft drinks factory where the crime took place in Dubai on 3 December 1993. In this case, A, T, and D agreed on a plan to burgle the factory where T and D worked. They knew that there would be a night watchman on duty. They bought adhesive tape, wires and cutting equipment to open the room, which they knew contained money (The prosecution gave evidence that they were joined by O and S). The accomplices entered the building and seized the watchman and both T and S held him and covered his face with the adhesive tape. T

⁹⁹ Egyptian Cassation Court Case No. 180 for 1934, Y. 3 , p. 234 (Arabic. *Decisions of the Egyptian Cassation Court*), Egypt; For other similar cases see: Husni, M., (Arabic. *Criminal Complicity*) *op. cit.*, p. 469.

¹⁰⁰ Dubai Cassation Court Case Nos. 82, 83, and 101, for 5 November 1997, unpublished decision.

strangled him with wire, while O and D broke into the room which the money was kept.

All accomplices were arrested and brought to trial on the charge of burglary and murder. The Dubai Court of First Instance sentenced A, T, and D to death penalty, and O to life imprisonment, while the defendant S was found not guilty because of paucity of evidence. The Court of Appeal up held the death penalty against the principal offender, T, the life imprisonment of O, and reduced the conviction of A and D to life imprisonment, while the defendant S was sentenced to life imprisonment as well in spite of the fact that he did not admit being an accomplice.¹⁰¹ A, D, and S appealed against the conviction to the Cassation Court of Dubai.¹⁰²

The appeal of the defendant A:

¹⁰¹ *ibid.* pp. 5-7. Usually, the Cassation Court is a court of law, which suggests that factual issues cannot be brought in front of it. However, in a ruling that involves a death penalty, the Cassation Court is considered a court both fact and law. The common ground of appeal means that the court may reverse the judgement in favour of the defendant if it finds that the previous ruling involved a defect concerning public order or based on a breach; misapplication or misconstruction of the law, or that the previous court had issued the ruling contrary to its jurisdiction, or that the another Code has been enacted in favour of the defendant. See: article (246) UAE Code No. 35 of 1992 on Penal Procedures & Rehabilitation . Moreover, the same Code provides some security to a defendant who has been ruled against with death sentence. Article (253) indicates: "Without prejudice to the preceding provisions, the ruling of death penalty shall be examined by Cassation Court, and the execution shall be suspended until the Court ruling. The clerk of the Court of Appeal that has issued the judgement shall send the case's file to the Court of Cassation within three days of the judgement. The Prosecution shall lodge with the courts records clerk a summary of its opinion on the judgement within twenty days of the date of its issue and provide lawyer for the defendant. The court shall dispose of the case according to the provisions in paragraph (2) of article (246) and paragraph (2) of article (249)."

¹⁰² D argued, *inter alia*, that there was no agreement to kill. The Court dismissed his appeal and referred to what it had stated against the defendant A. By comparison, S was acquitted because of paucity of evidence that he was an accomplice. *ibid.* pp. 10-16.

A argued that his conviction and sentencing to life imprisonment by the Court of Appeal was an error in applying the proper law. He said that the Court should not use the test of probable result (article 51), which linked his action of burglary to murder committed by T, fixing his guilt to both crimes by indicating that murder is a probable consequence of robbery. Further, he said that even in admitting his guilt to burglary, he is not responsible for murder because the killing of the victim by T was outside the common plot of the burglary, and insisted that T had acted alone. His grounds for such an argument is that he did not share the intention to kill, which is supported by him not committing even a minor act regarding the killing and therefore he should be acquitted.¹⁰³

The Dubai Court of Cassation strongly rejected the argument of A. The Court fully supported both the Court of First Instance and the Appeal Court in convicting him. The Cassation Court followed the two elements stated above regarding the liability of accessories in the additional offence, namely proving the accessorial involvement in the primary offence, and applying the test of probable consequences. First, the Court discussed in detail A's involvement in the primary offence of burglary, and how he was the instigator or the prime mover of nearly all the others, which clearly established his guilt. The Court stressed a strong point made by investigation of the role of A in general. The Court said that A had knowledge that there would be a committing of murder and that this is indicated by his meeting with T and D to discuss the plan in general. This was supported by the evidence that they bought cutting equipment, sticky tape, and heavy wire, which in fact were used in the killing

¹⁰³ *ibid.* pp. 5-7.

(the victim's face was fully covered with the tape and strangled by the wire). It is also supported by comparing the confessions of the other accomplices. Therefore, the Court was satisfied that A had both knowledge and intention to commit the burglary and the murder. Consequently, the Court dismissed his first argument.

The other argument of A was that the probable test should not be applied against him. The Dubai Court took this chance to respond to that argument and, at the same time, to address the probable test of article (51). It stated that:

“Article (51) of the F.P.C. is an exceptional provision indicated by the legislation, in this type of liability, to be applied instead of the normal principles of criminal law which suggests that a person is charged with a crime of either being a principal or a party to it. However, since a crime might bring about unwanted or unexpected additional results, the legislation produce a reference to charge and convict a person as an accessory where he contemplates or ought to contemplate those probable crimes of the primary crime. The enactment of this exceptional rule is based on the belief that the accomplice intended the primary offence and its natural and logical consequences. Even though this express article is placed in the elementary provision of the Code, it is considered as general principle that the evaluation of that probability should at first look at the first offence and infer what result it could produce, and this is done logically and by reference to ordinary course of events. Thus since murder is a probable consequence of burglary, the defendant's argument is not convincing and therefore his appeal is dismissed.”¹⁰⁴

The effects of the ‘Capri-Sun’ Case:

In English law, the liability of accessories is evaluated on subjective bases for both the primary and the additional offence. According to the F.P.C., the situation is different, as it requires a subjective element for the primary offence while the additional offence is considered (somehow) objectively. This indicates that the policy of the first is consistent and stable, while the latter directs liability at the beginning

up to its highest limit by connecting it to the concept of intention, and for the additional offence the scale drops heavily to the lowest boundary. This illustrates a lack of consistency, cohesion; and logical correspondence by the F.P.C. towards the entire subject. In other words, it appears that the F.P.C. does not establish accessorial liability unless there is a strong connection between the accomplices, which indicates that the aim is to punish only those with a strong mental link. This also suggests that the F.P.C. does not lend itself to a deterrent view regarding accessorial liability of the main offence, but surprisingly selects a strongly deterrent policy regarding the additional liability of accessories by linking it to imputed liability in spite of the fact that both primary and additional crimes are judged by a single doctrine.

On the other hand, the Dubai Cassation Court expressly indicates that article (51) is an exceptional rule. Consequently, under Arabic jurisprudence, this signifies that the rule is limited in its application and interpretation and should not be examined by comparison with other articles. This principle indicated expressly by the UAE Civil Code in article (30), states that:

“Exception shall not be acted upon in analogy and further interpretation thereof shall not be elaborated.”¹⁰⁵

This principle of civil liability is accepted by criminal law commentators and considered as a fundamental part of the doctrine of criminal law. However, although the Cassation Court is aware of this, it surprisingly stated that this elementary article is a general principle and to be applied in other fields of criminal liability. The Court

¹⁰⁴ *ibid.* pp. 9-10.

¹⁰⁵ Article (30) of UAE Federal Civil Transactions Code. No 5 for 1985, amended by the Federal Code No. 1 for 1987.

thus extended the scope of article (51) of the F.P.C. to a broad foundation contrary to article (30) of the UAE Civil Code. Moreover, in fact, this is a serious breach of the rule of legality, and must not be taken to represent the law at this point.

It might be argued that the Dubai Cassation Court followed Arabic jurisprudential principles, indicted before, that there must be proof that the accessories engaged with the principal offender in the primary crime and that the additional offence has to be a probable consequence of the primary offence of the accessorial participation. In spite of this, it did not precisely discuss the element of causation regarding accessorial liability in respect of the primary offence, and this casts more doubt on the issue of causation since accessories are formally named by F.P.C. as *accessories by causation*.

The most important observations in the case are to be found in the discussion of the required mental element of accessorial liability in respect of the additional offence. The Court indicated that it must first inquire into the element of the accessorial connection to the primary offence and then must infer its probable result. The question is how can such reference be made?

At first, the Dubai Cassation Court based the notion of the probable test on the opinion that the accessory either contemplated or ought to have contemplated the occurrence of the probable crime. This objective criterion is usually linked to the notion of the reasonable person. However, rather strangely, in a surprise move, the Court said that the F.P.C. indicates that the rule of probable consequences is based on

the belief that the accomplice intended the primary offence and its natural and logical consequences. This unpredicted move shows that it is hard to know what the Court had in mind in declaring the basis of guilt in this type of liability. This might suggest that there is no clear understanding of the whole subject, as it appears, by mixing two different concepts of intention and objective recklessness. Moreover, it might be possible that this misunderstanding is due to an earlier principle stated by the Egyptian Cassation Court, indicated above, which pronounced that accessories must legally expect all the probable and reasonable results, which logically and normally occurs from his involvement.¹⁰⁶ This is not say that the conviction of A was wrong, but that the Dubai Cassation Court was in doubt regarding a clear conception of the issue of mens rea that it should have established.

Nevertheless some would argue that in spite of this doubt the Dubai Cassation Court is in favour of applying objective recklessness as a connection to accessorial guilt. Is this correct? Do the Federal Courts of the UAE share this view?

Although that there is no similar decisions delivered by the Federal Courts in this regard, the answer must be in negative, for several reasons. One reason is that although the role of Dubai Cassation Court is appreciated by other federal courts, prosecutors, lawyers, and other officials, it is still merely a domestic court of the emirate of Dubai, and that the Federal Supreme Court (F.S.C), which is the highest judicial court of all other Emirates, has not examined the issue. Nevertheless, perhaps the F.S.C. would take the view of the Dubai Court because there is no clear

¹⁰⁶ Egyptian Cassation Court Case No. 180 for 8/1/1940, p. 234; Case No. 25 for 30/1/1961, p.156. (Arabic. *Decisions of the Egyptian Cassation Court*), Egypt.

difference between Islamic law, which is operated by the F.S.C, and secular law favoured by the Dubai Cassation Court regarding accessorial liability.

Another central reason is that the concept of 'probable consequence' under Arabic jurisprudence, particularly in Egypt, is a very problematic conception, as it is not easy for judges and jurists in this field to efficiently analyse and describe how this doctrine operates and what is its required state of mind. This controversy would result in an onerous task for UAE courts. One might suggest that UAE courts would be waiting for other Arabic criminal system to find a solution, as for example the Egyptian Court of Cassation. This might be true, but even Egyptian jurisprudence is struggling to define the issues of the required mens rea of accessories in the additional offence and that of how one can operate the probable test under accessorial liability. This Egyptian experience will continue because Arabic legal commentary is not yet aware of the problems that cover many aspects of the doctrine of criminal complicity.

A third reason is that the Cassation Court is likely to follow the majority of Egyptian judicial and legal commentary which lists crimes and indicates, by reference to common sense and the ordinary course of things, that crime X is a probable result of crime Y while crime Z is not. This, however, ignores another important aspect of the doctrine of criminal law, which indicates that when legislation creates liability, it should specify the conditions under which it operates and set out defences or excuses reducing its limits. This logical concept is not met by the terms of article (51) of the F.P.C. because it fails to indicate some defences against the application to this rule.

A critical question arises here. Did the Dubai Cassation Court in the '*Capri-Sun*' case intend to shift the burden of proof from the prosecution to the defendant? The answer is difficult because the wording of the F.P.C. is unhelpful on this point due to its broad meaning. However, if such shift is intended by the Cassation Court, it is unconstitutional because the UAE Constitution clearly indicates that those accused of criminal offences are presumed innocent until the contrary is proved.¹⁰⁷ The F.P.C. is almost silent in this respect but it is commonly acknowledged that the law on this point requires the prosecution to produce proof as to the guilt of the defendant beyond any reasonable doubt.

Moreover, if one presumes that the intention of article (51) is to divert the burden of proof to the defendant instead of the prosecution, and that is constitutional, this would give the defendant the opportunity to dismiss the charge or the conviction on the balance of probability that what had occurred was not an ordinary or natural consequence of his participation in comparison with the prosecution's primary obligation to prove the guilt beyond reasonable doubt. However, this cannot be true because the defendant in a criminal trial is entitled to prove his innocence on such balance of potentialities against the prosecution's allegation, and this is always considered as an essential element of a criminal trial. To require a defendant to defend himself against an unproved allegation is to deprive him from a fair trial in

¹⁰⁷ Article (28) of the UAE Constitution 1971. The UAE Penal Procedures Code No. 35 for 1992 put this into practice in article (2) which states that no punishment shall be imposed on any person unless he is convicted in accordance with the law.; Further, the UAE Civil Transaction Code No. 5, amended by Federal Law No. 1 for 1987, indicates the same broad terms of guaranty in articles (37) and (65).

accordance with the law. Thus, a person is presumed innocent and must be acquitted unless the prosecution offers evidence to prove beyond reasonable doubt, which requires the court to look at and weigh the strength of all the evidence presented at the time of the trial. Such proof must examine the accessory's state of mind concerning the additional offence of his joint enterprise. Legislation sometimes creates a statutory presumption to help the prosecution in proving the required state of mind regarding the offence, but here the prosecution does not have to prove anything beyond that there was a participation regarding the first crime and that the second crime is a probable result from the first. This might lead one to say that prosecution has to argue about the element of probability. Unfortunately in practice it does not. The prosecution only indicates in a very broad sense the application of the probable consequence test regarding the additional element because there is not as yet any single clear criteria to establish such test.

It must be noted that the Cassation Court of Dubai failed to value the importance of the issue by avoiding any discussion as to how this test works. It initially seems difficult to offer a clear view of the court's thoughts on applying the test of probable result.

One of the problematic issues is that article (51) does not suggest whether it makes the evidence conclusive or not because if it is the first, the accessory is not eligible to avoid conviction by any means, while according to the latter he can so. The situation is not clear in the UAE. It has been reported in Egypt that '*al-Haganya*' (the previous

These rules are recognised as one of the most important safeguards in criminal liability, which force

official name of the Ministry of Justice) made comments on article (43) of the Egyptian Penal Code regarding the probable test of the additional offence. It said that:

“If A and B enter an occupied house with a weapon and somebody tries to seize them, and A kills that person. The court can charge B with murder because it is a probable result of burglary, even though B does not intend the killing. Actually, there is no purpose of this article other than to affirm the rule that the accessory cannot defend himself by revealing that he did not intend the results which his actions might lead to.”¹⁰⁸

This is a very inflexible statement and presumes that crime Y is a probability of crime X and that this is conclusive evidence. The UAE courts should not adopt this opinion as it deprives the accessories from a fair trial, proof of guilt beyond reasonable doubt, and does not consider all the facts of each case. Most importantly, it is contrary to the requirement of mens rea.¹⁰⁹ It is important to indicate that whatever may be the law on the point; accessorial liability should not be enlarged beyond the criminal purpose that the accessory shares or subjectively-objectively knows. Probability has a significant evidential role in deciding the accessorial liability but to make it an independent ground for convicting accessories is not

judicial enforcement to do all efforts to ensure that no innocent person is wrongfully convicted.

¹⁰⁸ in Husni., (Arabic. *Criminal Complicity*), *op. cit.*, p. 465 at note 3.

¹⁰⁹ Some of the American commentary provides a strong criticism of the probable test in this regard by indicating that: “The ‘natural and the probable consequence’ rule of accomplice liability, if viewed as a broad generalization, is inconsistent with more fundamental principles of our system of criminal law. It would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind. Such is not possible as to one who has personally committed a crime, and should likewise not be the case as to those who have given aid or counsel...Indeed, the most that can be said for the ‘natural and the probable consequence’ rule of accomplice liability is that it has usually been applied to unique situations in which unusual principles of liability obtain. Two exceptions to the general rules ...are felony-murder and misdemeanour manslaughter... If the ‘natural and the probable consequence’ rule of accomplice liability is limited to such cases it is not objectionable or, at least is no more objectionable than other applications of the felony-murder and misdemeanour manslaughter rules.” Lafave, W. Scott, A., *Criminal Law* (2nd ed. 1986) West Group Publication. p. 590.

justified on penal policy grounds as it amounts merely a prediction of guilt and does not even base liability on negligence.

Reform:

One could argue that criminal law sometimes employs imputed liability, which is attributed on the basis that an action lacks one or more conditions that are generally required for guilt. Examples of these are the presumptive knowledge of law, strict liability, or intoxication. These examples are justified and in fact applied in the doctrine of criminal law but still are exceptional rules and do not cover every offence. For example, the F.P.C. sometimes reveals the aim for punishment regardless of the absence of a state of mind. An example of this is article (336), which blames the principal in assault for the death of the victim although he does not realise that death might occur.¹¹⁰ Such an exceptional departure could be justified on the grounds that there should be someone to blame for a serious result. Nevertheless, these examples provided for by the F.P.C. are concerned with the liability of the principal offender, who brings them about, as without his action, there could be no such more serious results, as in the above example of homicide. By comparison, accessorial participation needs to be analysed more deeply because often the connection between accessorial action and the more serious result seems to be remote, and in many examples the accessory lacks the mental requirement. Moreover it is accepted that one of the main functions of criminal law is to express the degree

¹¹⁰ Article (336) states that: "Whoever assaults another person physically in any manner without intending murder, but the assault leads to death, shall be sentenced to imprisonment for a period not

of wrongdoing by adopting mens rea as a mechanism of criminal liability, which is necessary and required by the legality principle, which in turns indicates that the commission of an act does not make a person guilty unless his mind is legally culpable. This should be accepted by the F.P.C. concerning the liability of accessories.

If one accepts the fact that linking the additional liability of accessories to a vague test of probability is considered to be a departure from what has been indicated above, it is useful to suggest reform in the view of Arabic jurisprudence relating to this type of liability. The reform should suggest moving the required mens rea from being linked only to probability to either intention (purpose or oblique), subjective recklessness, or objective recklessness, which all insist on evaluating the whole facts of the case before convicting accessories of the punishment in respect of the additional offence of the principal offender.¹¹¹

The question is: would it be sufficient to change the standard of mens rea in respect of the additional offence? Or, re-phrase the question, might Arabic legal commentary

exceeding ten years." See also articles: (334), (349), (357) which emphasise that contemplation of the more serious result is not an important issue.

¹¹¹ It is useful to remind that two concepts constitute mens rea in the F.P.C.: intention and fault. Direct intention means desire or purpose and knowledge that the action will inevitably cause another result. (*first degree purpose* and *second degree purpose*.) The F.P.C. is vague in relation to oblique intention, which suggests that this term does not exist in the Code. I suggested in chapter 3 that, at least in relation to accessorial liability, the F.P.C., should use either the view of the American M.P.C. which distinguishes knowledge of virtual certainty from other forms of mens rea and call it 'knowledge' or cl. 18 (b) of the English Draft Criminal Code which treats knowledge of virtual certainty as an oblique intention a part from purpose, or to adopt the use of *virtual, practical certainty* used in the English case law, before *Woollin*, as an evidence of purpose .

favour upgrading the imputed liability of the additional offence to the notion of intention?

This is a new question and has not been at any length discussed in Arabic legal commentary. The essential advantage of this is that it will benefit the accessory offender, who often does not commit any physical action and who does not possess any mens rea regarding the commission of the additional offence. However, because of his earlier involvement in the primary offence he is liable, with the principal offender, for both crimes. This promotion puts the categories of accessories onto the same level as the principal regarding the issue of mens rea, and, by the same token, it establishes conformity and adequately deals with one form of mens rea in both primary and additional offences. In other words, promoting the required mens rea from vagueness to intention would allow accessorial liability under the F.P.C. to determine accessorial mens rea in the whole doctrine of complicity by one form of mens rea, namely, intention. English law adapts this coherent approach; it requires one minimal mens rea for both the primary and the additional offence, with an obvious exception that such a standard under English law is knowledge or, recklessness.

As mentioned before, intention under the F.P.C. is presumably restricted to purpose or desire that the crime should be committed, and that it does not encompass oblique intention. Thus, without amending the F.P.C. in relation to oblique intention, any upgrading of the mens rea of article (51) to purpose is inappropriate and would lead in many examples to escape conviction. Moreover, prosecution would presumably intervene to stop any promotion of mens rea in this type of liability because it would

deprive the prosecution of the benefit of proof under the probable test and would make their task very difficult in proving purpose. At the same time such a promotion would act against the deterrent aim of the legislation envisaged in article (51). Realistically, any further discussion in this connection is unnecessary.¹¹²

Consequently, I should investigate the issue under recklessness. As has already been argued, the term fault or recklessness is not defined by the F.P.C.¹¹³ Under the F.P.C. this concept includes many mental states, and there is no equivalent of this term in the common law systems. However, fault under the F.P.C. has two broad meanings: advertent and inadvertent fault. Moreover, the F.P.C. does not expressly indicate how this term operates. Arabic legal commentators favour the objective test and not the subjective one to resolve the issue of mens rea. Further, it was indicated that the

¹¹² It has been indicated, in chapter 3, that Arabic jurisprudence has not reached consensus about the issue of knowledge or oblique intent. Moreover, it should be noted that some Egyptian judicial opinions attempted to link the liability of accessories in the additional offence to the notion of oblique intention as examined by Arabic jurisprudence. For instance, the Egyptian Cassation Court Case No. 180 for 1934, stated that: "If it is not possible to convict the accessory of the primary crime of theft in connection with the crime of murder committed by his principal, because there was not a satisfactory evidence that the accessory had a purpose for murder. Objective proof, that he had an oblique intention to murder, with reference to him being present at the crime, is sufficient for convicting him for the additional crime of murder, and this is based on the notion that his presence indicates that he had to contemplate the crime of murder, even though he had no such contemplation." Egyptian Cassation Court No. 180 for 1934, p. 234. Al Shinawi, *op. cit.*, p. 676, reports that the Kuwaiti High Criminal Court has adapted the above ruling of the Egyptian Cassation Court in its ruling in 17 November 1968. The Egyptian ruling has been heavily criticised in legal commentary that presumably forced the Egyptian Cassation Court Case to avoid such express discussion of this subject in future cases. Husni, M., (Arabic. *Criminal Complicity*), *op. cit.*, p. 470-1; Shinawi, *op. cit.*, p. 676. The Egyptian Cassation Court Case No. 180 for 1934 ignores the actual notion of oblique intention should be based on knowledge of virtual certainty rather than the above imputed test of mens rea, as it was mentioned by the Court. In fact the above Court addressed oblique intention as form of presumptive knowledge which actually deprives intention from its subjective nature. Such subjective nature is the key element of intention.

¹¹³ Article (38) states various forms of fault. It indicates that: "...Fault arises if a criminal result occurs by reasons of the defendant's fault, whether such a fault is negligence, indifference, carelessness, recklessness, imprudence or non-compliance with laws, regulations, rules, or orders."

F.P.C. does not mention the degree of risk needed to constitute fault, which means that the Code makes no distinction between gross fault and slight fault.

The question is therefore this: does subjective knowledge or recklessness provides a basis for reform? The answer to this is not provided in Arabic legal commentary. However, moving the accessorial mens rea into this standard would be a much easier solution rather than moving it towards the standard of intention, bearing in mind what had been said about prosecution's preference for flexibility in proving evidence. Such a move would bring some conformity with intention as a required state of mind in the primary offence. In spite of this, the criminal law of UAE is not equivalent to English law, and this is not only because of its historical background, but also because English law rules are mostly coherent, consistent, and systematic and operated with clear understanding, and because of the wealth of opinion in both case law and legal commentary. English law in general favours a subjective basis of liability. Understanding the codified criminal laws of the UAE is very difficult because of a paucity of cases and domestic commentary. Having said that, recklessness under the F.P.C. is generally not examined subjectively but in fact objectively. Article (38) implicitly states numerous frameworks of recklessness such as negligence, indifference, and carelessness, which suggests that the general part of the F.P.C. has favoured the Arabic jurisprudence preferences of objective recklessness, and for this reason a move to subjective recklessness is possibly not desirable.

This leaves us with one last proposal: objective knowledge or recklessness based on the test of the reasonable man. A moderate view expressed in some Arabic legal commentary, suggests that the proper accessorial mens rea in the additional offence is based on criminal intention for the primary crime, combined with unintended fault (objective recklessness) regarding the additional probable crime.¹¹⁴ M. Husni insists that the proper test of mens rea regarding accessorial liability in the additional offence, should be based on an objective standard, and that should be expressly stated by the legislation. Thus, objective recklessness indicates that the accessory should contemplate or ought to contemplate the possibility of the probable result.¹¹⁵ Under this view, the courts have to look to all the evidence surrounding the case such as whether there was an agreement not to act in a certain manner or whether the offenders had knowledge of firearms and other relevant factors that might help to decide foresight or contemplation.¹¹⁶

This might be a satisfactory option for amending article (51) if the UAE legislation decides not to move the required mens rea of the additional offence to a subjective

¹¹⁴ Husni, M., (Arabic. *Criminal Complicity*), *op. cit.*, p. 473; Bhanam (1995), *op. cit.* p. 700. It has been argued earlier that Bhanam connects mens rea to the broad concept of knowledge and a remote risk defence that should be available to accessories but here he returns to the standard of the reasonable man. Husni, by contrast, has a better view except where he lists certain crimes as a probable results of others, as it has been illustrated earlier.

¹¹⁵ Husni, M., (Arabic. *Criminal Complicity*), *op. cit.*, p. 473.

¹¹⁶ Husni suggests that: "Accordingly, the probable criteria is not subjective because it does not examine the psychological part of the accessory to decide whether he had actually expected the result or not. Moreover, this criterion is not a pure objective because its investigation is not limited to the examination of the physical relationship between accessorial action and the crime, like exploring the issue of causation. It only examines the notion of the accessory being able to contemplate or ought to contemplate the committing. It is obvious that one cannot decide such ability and duty to contemplate unless we investigate the circumstances in which the partner's activity took place and whether they allowed him to expect and make this expectation. In other words, the formula is that of a reasonable person in the position of the defendant, who expected the occurrence of the additional offence, committed by the principal. The criteria is objective in its nature but some personal elements enter into its contents." *ibid.* p. 468.

standard of liability. Having said that, I believe that for the current situation, article (51) should be approached by courts on the above objective standard, without waiting to the F.P.C. to be amended, because it is the only way one can stop the harsh application of imputed liability and embody a consideration of justice on this type of criminal responsibility.

Chapter 5

Miscellaneous aspects related to accessorial liability

Chapter 5

Miscellaneous aspects related to accessorial liability

This chapter, the final chapter of the thesis, aims to examine a number of important and related aspects of accessorial liability. The first of these is: issues related to the liability of the principal offender by indicating the definition of this category and the legal distinctions between those who are principals and those who are merely accessories. After this, I shall examine the derivative theory, which is considered the cornerstone of accessorial liability, and point out some of the problems that led the English Law Commission to introduce a proposal to change the shape of accessorial liability to one based on inchoate liability. Under this proposal, the notion of accessorial liability or criminal complicity is abandoned. In addition, I shall discuss the doctrine of innocent agency, which is a legal fiction that has emerged to deal with the limitation of derivative liability and which considers and treats an accessory as a principal offender. Final comments will be concerned with examining selected defences available to accessories, such as withdrawal. As with previous chapters, our examination starts with English law, followed by the UAE law. It should be noted that because of some similarities between the two systems, some of the matters discussed in English law will not be repeated in so far as they are similar in the UAE law.

(A) Issues related to the liability of the principal offender

Who is the principal offender:

The principal is the main actor in the commission of the offence and usually the person who commits the *actus reus*.¹ Under this definition, the role of the principal is viewed as being that of the person who, in law, performs the offence, as is normally indicated by the wording of the offence.² Other definitions place emphasis on causation as being the distinctive feature of the definition of who is the principal by indicating that the principal is the most immediate cause of the *actus reus*.³ Nonetheless both definitions focus on a single criterion: a person who brings about the *actus reus* of the offence. This leads one to classify principals as follows: *the single principal*: where a person commits the *actus reus* required of an offence; the *co-principal*: where two or more bring about the *actus reus* of a crime together, or each commits an act or acts specified for the offence; the *constructive principal*: where one assists or encourages an act or acts done by another, who is considered as 'innocent agent' and is thus not guilty of an offence. Here the provider of assistance or encouragement is considered a principal offender in respect of an offence.⁴

¹ Elliot, C & Quinn, F., *Criminal Law* (1st ed. 1996), Longman. p. 150.

² Williams, G., *Textbook of Criminal Law* (2nd ed. 1983), London: Stevens and Sons. p. 329.

³ Smith, J.C., *Smith and Hogan Criminal Law*, (18th ed. 1996), London: Butterworths. p. 128.

⁴ Gillies, P., *The Law of Criminal Complicity* (1980), Australia: The Law Book Company Ltd.

Legal distinction between principal and accessory:⁵

Ashworth claims that in English law there is little practical difference in distinguishing principal offenders from accessories.⁶ The main reason for this is that the Accessories and Abettors Act 1861 indicates in s. 8 that a person who aids, abets, counsels and procures shall be tried, indicted and punished as a principal offender.⁷ Surprisingly, Ashworth stresses practice here rather than any general principle requiring that the role of the principal be distinguished from that of the accessory. It is clear that in Ashworth's writing he bases his approach on principles of criminal law (such as fair labelling), an approach similar to legal commentary in the civil law tradition, rather than on practice of the courts. However, he does not rely entirely on legal practice, as he indicates that English courts try to encourage prosecutors to give the defendant fair warning of the charges against them, not just generally, but by specifically with terms such as 'aid, abet, counsel, and procure.'⁸ However, others either expressly indicate the need to distinguish or directly describe such legal

p.139; Halsbury's Laws of England indicates: "A principal is a person who by his own act or omission directly brings about the actus reus, or any part of the actus reus, of a crime. A person may be a principal, notwithstanding the fact that he is not present when the crime is committed, if he causes the actus reus by some contrivance, or by the use of an innocent agent." Halsbury's Laws of England (4th ed. 1990) Vol. II (I), London: Butterworths. p. 44. See for example, *R v. Sheppard* (1839) C & P 121; *R v. Kelly and M'Carthy* (1847) 2 Car & Kir 379.

⁵ A classification used by Glanville Williams, *TBCL*, *op. cit.*, p. 333.

⁶ Ashworth, A., *Principles of Criminal Law* (3rd ed. 1999), Oxford: Oxford University Press. p. 247; It is worth noting that Halsbury's Laws of England indicates that since all accomplices are liable to be tried and punished as a principal offender, it is unimportant to distinguish between accomplices in a crime and that the words 'aid, abet, counsel or procure' may all be used in an indictment against a secondary party as was suggested in *Ferguson v. Weaving* [1951] 1 K.B. 814, [1951] 1 All ER. *op. cit.*, Vol. II (I) pp. 44-5.

⁷ Dennis, I.H., *Sweet & Maxwell's Criminal Law Statutes* (3rd ed. 1995), London: Sweet & Maxwell. p. 1.

⁸ Ashworth, A., *PCL*, *op. cit.*, p. 248, note 14.

distinctions.⁹ Thus, it is necessary to distinguish between principals and accessories because of the 'different character of their contributions to a given crime.'¹⁰ For example, Gillies insists that any reformulated code of criminal complicity should distinguish between these two different types of responsibility in response to their different characters; and principles produced from the nature of the culpability they entail.¹¹ (Neither the 1989 Draft Criminal Code nor LC. no. 131 acknowledges this). The main differences are (from substantive criminal law, which is the concern of this thesis):

Actus reus: The source of liability in relation to the principal offender is to be found in the definition of the offence committed, which might differ from one offence to another in relation to the different descriptions, special characters and requirements. The accessory is not treated similarly, as his source of liability is governed by only one general provision of the Accessories and Abettors Act 1861 (s.8), and common law precedents, which address this liability, often, under a single concept of to 'aid, abet, counsel, or procure an offence'. Moreover, it is generally assumed that the principal must perform an actus reus for every crime of which he is to be convicted. This is not the same rule required for conviction of being an accessory. The direct example is the doctrine of common purpose (accessorial liability for an additional offence committed by the principal). The principal here is required to commit both the actus reus of the main and any additional crime, while

⁹ Clarkson C. Keating, H., *Criminal Law: Texts and Materials* (4th ed. 1998), London: Sweet & Maxwell. pp. 535-6; Williams, G., *TBCL*, *op. cit.*, p. 333; Smith, J.C., *Criminal Law* (1996), *op. cit.*, p. 127; Gillies, P., *Criminal Complicity*, *op. cit.*, pp. 39- 41.

¹⁰ Gillies, P., *ibid.* p. 41.

¹¹ Gillies, P., *ibid.* p. 286.

the accessory needs only to commit the actus reus of providing help or encouragement in relation to the main crime. In relation to his liability for any collateral or additional offence, there is no need to prove a further actus reus on his part; all that is required for his liability is proof of the requisite mens rea in relation to the principal's acts.

Causation: As discussed above, English law does not consider causation as an essential element of the liability of secondary parties. Importantly, in deciding the liability of the principal who commits the crime, the principal may only be convicted if he causes the offence by himself, either jointly with another co-principal or through an innocent agent. The level of proof is one of beyond reasonable doubt.¹²

Omission: As Gillies indicates, the definition of some offences such as assault, burglary, and robbery is restricted to the criteria of the act rather than omission unless the omission can be construed as being part of a continuous act or broader event.¹³ The liability of accessories in this regard is broader than that of the principal. The issue of inaction in aiding and abetting comes under two headings: mere presence, and omission based on duty and control. Mere presence is no more than *prima-facie* evidence from which the jury may infer encouragement because the

¹² One might think that accessorial liability would require causation, as suggested by K. Smith, based on the vague notion of 'making the difference'. However, if this is true, it would be still not similar to the requirement of but-for test of causation required for the principal offender.

¹³ Gillies, P., *Criminal Complicity*, *op. cit.*, p. 42. For example it was held in *Fagan v. Metropolitan Police* [1969] 1 Q.B. 439, that the definition of some offences such as assault is restricted to act rather than omission which insufficient unless it can be understood as an act. See for example, Childs, P., *Nutcases: Criminal Law* (2nd ed. 1999), London: Sweet & Maxwell. p. 1.

presence of another during the offence offers moral support to the principal.¹⁴ By contrast, omission is a failure to act where there is duty to intervene or where a right of control exists. Such duty to act may be created under statute but more commonly arises under common law categories such as the holding a public office which requires a duty of care to others, the duty of parents towards their children, the voluntary undertaking of the care of another who is unable to care for himself, and situations in which there is a contractual duty of care.¹⁵

Mens rea: It has been pointed out that the mens rea required for accessories is not the same as that of principals. This is viewed by Glanville Williams as the chief grounds for distinguishing between principals and accessories.¹⁶ An example of this is the crime of murder, which requires the principal to possess intention to kill or to cause GBH, while to secure the conviction of an accessory, the prosecution only has to prove that he actually contemplated that the principal might have intended to kill or cause GBH. This is clearly a major difference and cannot be ignored by reference to wording of the 1861 Act and the practice of courts. Moreover, the accessory must possess mens rea for every crime he engages in, while the principal might be convicted without mens rea, as in the case of strict liability.

The derivative nature of accessorial liability: Given that accessorial participation is not a crime in its own right, except where assisting or otherwise

¹⁴ *Coney* [1882] 8 Q.B. 534; *Wilcox v. Jeffery* [1951] 1 All ER 464, K.B.D; *R v. Allan* [1963] 2 All ER 89; *R v. Clarkson and Carroll* [1971] 3 All ER 344.

¹⁵ *Dytham* [1979] Q.B. 722; *R v. Russell* [1933] VLR 59, (an Australian Case); *Nicholls* [1874] 13 Cox CC 75; *Stone and Dobinson* [1977] QB 354; *Pittwood* [1902] 19 TLR 37.

participation in an act is made criminal (as in the case of the statutory offence of aiding suicide), accessory liability must depend on the criminal liability of the principal being established. This is often described as the ‘derivative theory’, which means that in order to establish accessory liability the principal (whom the accessory aided, abetted, counselled or procured) committed the offence or at least attempted to commit it. This is understood by Glanville Williams as meaning that *someone* must be proven to have been a perpetrator of the offence.¹⁷ Although English law adheres to this essential point, courts have improved on and slightly moved away from its literal reading, as we shall see later on. However, it remains a fundamental part of accessory liability. For example, Bronitt indicates that the modern common law of accessory liability has excessively moderated the derivative theory from what it was in the 16th century, which required that ‘to be guilty as an accessory, the principal had not only to be convicted but punished as well.’¹⁸ However, as Bronitt observes, accessory liability still requires proof of the guilt of the principal, which is based on the assumption that the offence must be committed or at least attempted by the principal.¹⁹ The law here considers accessory involvement as irrelevant in terms of being serious and dangerous and not worthy of being punished unless such involvement led to a crime committed by the principal. (This assumption is true regarding aiding, while for encouragement there is an inchoate offence punishing unsuccessful encouragement under inchoate liability).

¹⁶ Williams, *TBCL*, *op. cit.*, p. 333.

¹⁷ Williams, *ibid.* p. 333.

¹⁸ Bronitt, S., “Parties to a Crime” <http://law.anu.edu.au/criminet/notes.html/>.

¹⁹ Bronitt, S., *ibid.*

Vicarious liability: Vicarious liability (which is the liability of one person for the act of another, as it is found in some offences of strict liability, expressly or implicitly stated by a statute) means that a person may be held to have committed an offence, not by reason of anything he has done but by reason of an act done by another who is in his employment or authority.²⁰ Such a person is labelled as a principal offender and not as an accessory.²¹

Attempt: Liability for attempt is a form of liability attached, first of all, to the principal who carries out an act (indictable offences, either-way offences, but not summary offences unless required by a statute) more than merely preparatory to the commission of an offence. Undoubtedly, there would be accessorial liability if the principal attempted to commit a crime, but this depends on there being a principal, which by the same token indicates that 'one can attempt to be a principal but not to be an accessory'.²²

Jurisdiction: It is generally acknowledged that a person who aids and encourages a crime committed outside the territorial jurisdiction of English law may not be charged with being an accessory (unless there is a special provision for this in a

²⁰ Law Commission Report No. 177, *Criminal Law: A Criminal Code for England and Wales* (1989). Vol.2. pp. 211-2. Note that the Draft Code has expressly indicated, in cl. 26 ss.(2), that such liability is addressed under the liability of the principal offender as reflection of the existing law. *ibid.* vol. 1 and vol. 2 p. 204.

²¹ Smith, J.C., *Criminal Law* (1996), *op. cit.*, p. 127.

²² Williams, *TBCL*, *op. cit.*, p. 333. See: s.1(1) Criminal Attempt Act 1981.

statute), while those who aid, abet, counsel or procure a crime, for example in Scotland, may be convicted as accessories to a crime committed in England.²³

Punishment: The Accessories and Abettors Act 1861 clearly indicates, in s. 8, that accessories shall be tried, indicted and punished as principal offenders, which might be classified strictly in the sense of the accessorial derivative nature. However, in modern day practice, English law, following the House of Lords decision in *Howe* (1987), has moved forward by acknowledging that accessories might be liable for a greater offence than that of their principal based on their greater contribution to the crime involved.²⁴ According to Glanville Williams, English courts may distinguish between principals and accessories in deciding their punishment according to their role, but such flexibility is restricted in murder as a consequence of the application of a fixed sentence of life imprisonment for accomplices.²⁵

(B) The derivative theory

Accessorial liability or complicity (as some might prefer to call it) is not an offence in its own right but a mode of participation in another person's criminal offence. This important distinction is known as the derivative theory or concept, which, in fact, is one of the cornerstones of accessorial liability.

²³ *Robert Millar (Contractors) Ltd* [1970] 2 QB 54, [1970] All ER 577; *Godfrey* [1923] 1 KB 24. See: Card, R., *Card, Cross and Jones Criminal Law* (13th ed. 1995), London: Butterworths. p. 552.

²⁴ *Howe* [1987] AC 417. Cf. *Richards* [1974] QB 776.

²⁵ Williams, *TBCL*, *op. cit.*, p. 332.

The problem of identifying accomplices:

The derivative theory is an essential element in criminal complicity, stating that in order to establish the guilt of accessories there must be a principal offender.²⁶ For example, in *Thornton v. Mitchell* (1940),²⁷ a bus driver had to reverse as a result of the conductor's signal, a pedestrian was knocked over as a result. The Divisional Court acquitted the driver of being a principal in driving without due care, while the conductor was for his part acquitted because there was no principal offence (for driving without due care) that he had aided and abetted. The derivative theory requires that there is a commission of an actus reus by a principal before the guilt of accessories can be established. Moreover, although as matter of practice accomplices should be tried together, there is nothing in law that states that accessories can be tried and convicted after the conviction of the principal offender, since the prosecution has to establish the commission of an offence by the principal offender rather than his guilt (there could be some problems as in a situation where the principal, for example, has escaped trial because he acted in self defence, which means there is no crime neither for him nor the convicted accessory). Logically the prosecution and the courts should fully examine the case to see if there might be such a defence that might lead to acquittal of the accessory. Also it should be noted that conviction of the principal is merely a *res inter alios acta* (a thing done between others) rather than conclusive evidence.²⁸

²⁶ *Russell on Crime* (12th ed. 1964, by J. Turner), p. 128.

²⁷ *Thornton v. Mitchell* [1940] 1 All ER 339.

²⁸ Williams, *TBCL*, *op. cit.*, p. 331. Moreover, there is no need to convict the principal before the accessory: *Austin* [1981] 1 All ER 374; *Anthony* [1965] 2 QB 189. The acquittal of the principal, for reasons other than no crime was committed, does not benefit the accessory: *Hui Chi-ming v. R* [1991] 3 All ER 897; s. 74 of the Police and Criminal Evidence Act 1984. See: Smith, J.C., *Criminal Law*

It should be noted that the practice of English courts in cases when the identity of the principal is not known is to treat all parties as accomplices.²⁹ This is subject to proof, beyond reasonable doubt, that each must have been either the principal or an accessory. It seems that if such a standard of proof cannot be met, there can be no conviction of complicity.³⁰

For example, in *Giannetto* the defendant was charged with the murder of his wife.³¹ He was convicted although the prosecution could not prove that he was either the encourager or the perpetrator of the murder. He appealed against his conviction on the ground, *inter alia*, that the trial judge made an error in not directing the jury that they must be unanimous as to whether he was a principal or an encourager. However, his appeal was dismissed. The reason for this dismissal was that the prosecution was unable, 'for good reasons', to prove that the defendant was either an accessory or a

(1996), *op. cit.*, pp. 151-2, where he criticises the decision of *D.P.P. v. Shannon* [1975] AC 717, a case indicated that acquittal of one party to conspiracy does not lead to the acquittal of the other party.

²⁹ This is an old rule applied in the case of *Swindall And Osborne* (1846) 2 C & K 230 which was taken by the English Draft Criminal Code 1989, in cl. 28 (1), to represent the common law in this regard. Law Commission Report No. 177, *Criminal Law: A Criminal Code for England and Wales* (1989). Further, Halsbury's Laws of England indicates that "If several persons act together in a common unlawful enterprise and the actus reus of the crime is caused by one of them, but it is not known by whom, all are principals in its commission.", *op. cit.*, Vol. II (I) p. 44. See for example: *R v. Salmon* (1880) 6 Q.B. 79; *R v. Pridmore* (1913) 77 JP 339. Cf. *R v. Borthwick* (1779) 1 Doug KB 207. See also, *Swindall & Osborne* (1846) 2 Car & Kir 230; *Smith v. Mellors & Soar* (1987) Cr. App. Rep. 279; *Fitzgerald* [1992] *Crim. LR* 660. Cited in Card, R., *op. cit.*, p. 568.

³⁰ *Lane & Lane* (1985) 82 Cr. App. Rep. 5; *Russell & Russell* (1985) 85 Cr. App. Rep. 388; *Aston and Mason* (1992) 94 Cr. App. Rep. 180. See: Card, R., *Criminal Law* (1995), *op. cit.*, p. 568. Edward Griew, who was a member of the drafters of the Draft Criminal Code 1989, indicates that the guilt of accomplices at this exceptional circumstances, requires first that one of the accomplices aided, abetted, counselled or procured the commission of the offence by the other, 'whether by positive act or exceptionally by omission failing to exercise a right or duty'. Second that each knew or at least was reckless to the conduct of another. E. Griew, E., "It Must Have Been One of Them" [1989] *Crim. LR* 129 at 130-1; Card, R., *Criminal Law* (1995), *op. cit.*, p. 552. Conviction should not be based on the terms: 'joint enterprise or acting in concert', this is against the general assumption that knowledge between parties is not an essential element in establishing accessorial liability. Moreover, the use of the above terms might bring confusion that prosecution should establish knowledge, something that is surely not desired by prosecution and might lead to an acquittal. Thus, it is more appropriate instead to use the term 'accomplices'.

principal, and this therefore should not lead to acquittal, especially when the evidence indicates that the defendant was involved in one way or another in the murder. Thus, to secure the conviction, the jury were invited to find at least that the defendant encouraged the murder. This was based on the fact that s. 8 of Accessories and Abettors 1860, as amended, indicated that any one who aids, abets, counsels or procures a crime is liable to be tried, indicted, and punished as a principal offender. Such a rule gives a measure of flexibility to the prosecution and to courts to avoid applying a strict form of derivative theory, which might lead to the acquittal of an accomplice when the identity of the principal is not known.

However, bearing in mind that there are actual and theoretical differences between principals and accessories, especially in respect of causation and mens rea, courts should be neutral in this regard by restricting such a rule to a situation where it is difficult or impossible to establish the identity of the principal, otherwise the prosecution, where it can establish such identity but cannot secure the conviction of the principal, might try to convict a person without establishing the elements of liability as it is required by the law in respect of the establishing of the guilt of the principal.³²

³¹ *Giannetto* [1997] 1 Cr. App. Rep. 1.

³² The House of Lords in *Maxwell* [1978] 3 All ER 1140 held that, 'whenever possible', the prosecution should clarify in the listing charge of the offence whether the defendant was a principal or merely an accessory. By implication, when it is impossible to do that, the defendant cannot cling to the above direction when the facts of the case shows that he was at least an accessory. See: Glazebrook, P. R., "Structuring the Criminal Code: Functional Approaches to Complicity, Incomplete Offences and General Defences", in Simester, A. P., & Smith A. T. H., (eds.), *Harm and Culpability*, (1996), Oxford: Clarendon Press. p. 195 at 199.

Comments on the new proposal of LC. No. 131:

The English Law Commission in their report No. 131 has introduced a remarkable new concept in their proposal to abolish criminal complicity, and have created instead an inchoate liability for assisting and encouraging crimes. This means that the derivative nature of criminal complicity, which is currently a major feature, should not be required any more and, consequently, should be consigned to the legal history books. The new offences would be committed as soon as one intentionally encourages another to commit a crime or as soon as one assists another with the knowledge or belief that he may commit an offence.³³ Moreover, liability based on common purpose or joint enterprise (liability for additional offences) should not be part of these new offences and it is to be located elsewhere. In fact, this move is not

³³ *The offence of assisting crimes*, (paragraph 4.99, pp.113-4) indicates that:

“(1) A person commits the offence of assisting crime if he

(a) knows or believes that another (the principal) is doing or causing to be done, or will do or cause to be done, acts that do or will involve the commission of an offence by the principal; and

(b) knows or believes that the principal, in so acting, does or will do so with the fault required for offence in question; and

(c) does any act that he knows or believes assists or will assist the principal in committing that offence.

(2) Assistance includes giving the principal advice as to commit the offence, or as to how to avoid detection or apprehension before or during the commission of the offence.”

The offence of encouraging crimes, (paragraph 4.163, p. 133) indicates that:

“(1) A person commits the offence of encouraging crime if he

(a) solicits, commands or encourages another (the principal) to do or cause to be done an act or acts which, if done, will involve the commission of an offence by the principal; and

(b) intends that that act or those acts should be done by the principal; and

(c) knows or believes that the principal, in so acting, will do so with the fault required for the offence in question

(2) The solicitation, command or encouragement must be brought to the attention of the principal, but it is irrelevant to the person's guilt whether or not the principal reacts to or is influenced by the solicitation, command or encouragement.

(3) The defendant need not know the identity of the principal, nor have any particular principal or group of principals in mind, provided that he intends his communication to be acted on by any person to whose attention it comes.

(4) ‘Offence’ in sub-paragraphs (a) and (c) of sub-section (1) above means the breach of a specified prohibition laid down by statute or the common law; but for the purposes of this section the defendant may solicit, command or encourage the commission of such an offence without intending that it should be committed at a specific time or place.” Law Commission Consultation Paper No. 131, *Assisting and Encouraging Crime*, (1993).

totally surprising since English law indeed replaced the strict notion of derivative theory (e.g. irrelevancy of causation, focus on the mens rea required for accessories than joint state of mind of accomplices, liability of accessory for more serious crimes rather than the principal...etc.) However, the surprise is in the proposal to abolish criminal complicity and the cutting-off from it the doctrine of common purpose.

Under the new proposal of the Law Commission, the derivative nature of criminal complicity is to be abandoned for a risk-based theory. That such new liability is to be treated as an inchoate crime suggests that there is to be no more discussion of criminal complicity. The aim of the new proposal is to avoid problems caused by the derivative nature and to fill the gap of not being able to punish some dangerous forms of assistance that still require the principal to commit the offence. One must say that such a proposal is simpler than the current situation in terms of the language used; there is greater clarity as to the mens rea requirement but should this in itself be enough to support this theory? This is possibly not so, since there are some points that stand against this critical move. The proposal relating to the new offence of assisting crimes involves some major difficulties:

Unnecessary extension of criminal law: One must acknowledge that some forms of assisting crimes are dangerous and anti social in nature (e.g. supplying gangs with weapons or information in the knowledge that without them the offence might not be committed) and should be punished. Law enforcement agencies are unable to stop such activities before the committing of an offence because of the derivative theory that operates under criminal complicity (unless of course there is an

express crime such as for example possession of weapons). Secondly, creating an inchoate offence of assisting crimes can be considered as a step forward in controlling crime in its earlier stages and by the same token reducing the chance of greater harm caused by the principal's offence.³⁴ However, there are some other major factors against such a move: LC. No. 131 suggests that the new crime should cover statutory and common law offences.³⁵ This is an unnecessary extension of criminal liability in comparison to the liability of the principal, which has not yet been similarly treated. Such a move might also incriminate some actions that otherwise seem innocent in general and not infringements of the criminal law.

A random example of the non-intervention of criminal law is found in the Theft Act 1968 which indicates that it is not an offence to pick fruits, flowers or foliage from a plant growing wild unless the picker is doing that for reward or sale.³⁶ Thus criminal law here does not attach responsibility to the principal because the desire is not to extend the law and consequently under the current situation of the form of assistance there would be no accessorial liability in the above example. However, under the new proposal giving help to the picker in the above example is a crime in spite of the fact the principal does not commit any crime. This would only be the case, of course, if the accessory thought that the principal was acting with the mens rea that would make the act criminal, that is, if he thought that the principal was likely to sell the picked flowers. This example leads to the question of whether all form of assisting crimes can be viewed as dangerous and anti-social behaviour. Thus, applying the

³⁴ *ibid.* pp.79-83.

³⁵ *ibid.* pp.91-2.

³⁶ Slapper, G., "Case Notes: A Curious Branch of the Law" May 23 2000 *The Times: Law*, p. 51.

new offence of assistance to all crimes, even to summary offences is a very serious extension of English law that attaches great importance to harm-theory rather than to risk rationale.³⁷ The drafters of LC. No. 131 possibly had in mind that the best way of controlling crimes is to extend accessorial liability and demolish the general theory of criminal complicity. However, one should view this approach with caution. Such a move can be viewed as excessive and inappropriate in terms of defining what constitutes a crime. For example, generously serving alcohol at a party with the knowledge that a person *might* be driving afterwards would be a criminal offence of assisting crimes although the other person might not drive at all. Selling or giving a knife (or any other object) to someone with the knowledge that he might kill or assault someone constitutes an offence although the other actually might use the knife or the object for innocent purposes. Thus, under the new proposal, the offence of assistance requires a low-level mens rea, and culpability would be considered as being complete once the offender provides assistance with merely the knowledge that the other might use it to commit an offence.

The following question should be asked: are there any other options in this context? Why should not the law relating to the liability of the principal be extended? For example, the crime of attempt, under the liability of the principal offender, means any act that is more than merely preparatory to the intended commission of a crime. Thus intention and the merely preparatory stage are the essential elements in attempt. Any move to a risk-based theory should also consider shaping the concept of attempt to a line similar to the new proposal for accessories. The drafters of LC. No. 131

³⁷ Smith, J.C., "Criminal Law of Accessories: Law and Law Reform" (1997) 113 *L.Q.R.* 453 at 460.

could have proposed such a modification in attempt, by reason of their attachment to the theory of risk-based liability; by considering that the principal acting in the merely preparatory stage commits an attempt might be justified as a means giving the law more scope to control crime. Moreover, as a concomitant of the new risk-theory, attempt might be constituted even where the principal acts recklessly (on the view that any move to risk-theory should be applied to all parties of criminal offence). Is there a serious need for such an extension of criminal law under the assumption of risk theory? Properly not, but if such a proposal is accepted I think it should logically also be considered in regard to the liability of the principal offender.

Punishment: Although the LC. No. 131 proposed that criminal complicity should not exist any more following the proposal of the new offences of assisting and encouraging crimes, they were influenced by the doctrine of complicity, which allows imposing similar penalties of the crime committed on accomplices. Such influence is seen in the recommendation that the offenders of the new two inchoate crimes should receive the same maximum punishment for the crime that has been encouraged or assisted and that differences in the level of culpability should be left to the discretion of the court.³⁸

This recommendation implicitly suggests that the LC. No 131 still uses the derivative theory by requiring excessive punishment of the offenders of the new offences although there is no connection between the new offences and the liability of the principal. One should bear in mind that even a supporter of such a new move would still question such proposal in relation to the excessive punishment required by the

proposal. For example, C. Clarkson and H. Keating (1998) argue that because of the philosophy of LC. No. 131 in distinguishing principals from accessories according to a distinction between harm and danger theory, it logically follows that a lesser blameworthiness or lesser harm caused should result in a lesser level of criminal liability and punishment.³⁹

Common purpose: I have already discussed that the concept of common purpose has generally been employed in the doctrine of criminal complicity to resolve the liability of an accessory to an additional crime committed by the principal. It means that this concept is an essential part of the general doctrine of criminal complicity. This fact indicates that in order for such concept of common purpose to be established there must be first of all criminal complicity in the main or the original crime, which suggests a strong link between liability for additional crimes and

³⁸ LC. No. 131, paragraph 4.188, pp. 141-2.

³⁹ For example, although C. Clarkson and H. Keating are supportive of the new proposal of LC. No. 131, they think that there must be a distinction in relation to punishment, suggesting that English law should take a similar approach to the German criminal law in this regard. They state that:

“The accessory who provides assistance or encouragement is clearly blameworthy, but not as blameworthy as the principal who actually pulls the trigger, stabs with the knife or takes the property. It is the principal who is the dominant party who has to make the final decision to commit the crime... The accessory is likewise tainted or contaminated—but for what he has done, namely his lesser role of assistance or encouragement. Of course, it does not follow that all secondary parties should be treated the same. One might wish to distinguish between different classes of accessories in terms of their liability and punishment. The actions of the instigator or master-mind behind the crime are arguably more reprehensible than those of an accessory simply assisting the principal at the scene of the crime; the causal contribution of such an instigator towards the ultimate crime is certainly greater; he may thus deserve greater punishment. These ideas are recognised by German law which provides that punishment for an accessory be reduced as follows:

1. Instead of life imprisonment, the punishment is imprisonment for not less than three years.
2. In cases of prescribed terms of imprisonment, the maximum term may be reduced to three-fourths of the prescribed maximum. The same reduction applies to monetary penalties.
3. The minimum term of imprisonment is mitigated as follows:
 - A. From a minimum of ten or five years to a minimum of two years.
 - B. From a minimum of three or two years to a minimum of six months.
 - C. From a minimum of one year to a minimum of three months.
 - D. In other cases the statutory minimum is retained.” Clarkson C. Keating, H., *Criminal Law: Texts and Materials* (1998), *op. cit.*, pp. 572-4.

criminal complicity and that they are not to be separated. Because LC. No. 131 proposal demolishes the doctrine of criminal complicity, the Commission suggested that liability for common purpose is to be treated separately from their new proposal of encouraging and assisting crimes and should be located elsewhere. J.C Smith logically emphasises that the concept of common purpose is certainly part of the doctrine of complicity, and cannot be separated from the complicity doctrine; if it is, he says that it would be like ‘cutting the tail of a dog, the tail will not wag any more.’⁴⁰ Therefore, it is true to say that in order to establish such liability there would still be a need to establish criminal complicity. This means that we will still use the term complicity or accessorial liability although the new crime proposed by LC. No 131 tries to abolish it.

To conclude, if there is, exceptionally, a need to create an inchoate offence of assisting crimes, criminal complicity should not be abolished but, rather, one should have such inchoate liability of assisting crimes as the current offence of incitement with its own punishment.⁴¹ Likewise it would preferable that such a new offence be applied only to assisting felonies or a selected offences such as murder, arson, burglary, robbery, rape and similar serious offences or, if needed, to selected misdemeanours rather covering every statutory and common law offence. Moreover, in terms of mens rea, assisting crimes should be based on intention (purpose and

⁴⁰ Smith, J.C., “Criminal Law of Accessories: Law and Law Reform” *op. cit.*, 453 at 463.

⁴¹ It is a fact that the criminal complicity is largely a matter of common law which might be the reason for uncertainty that affects nearly every part of this doctrine. However, such uncertainty cannot be taken as a major factor in the demolition criminal complicity by cutting it into parts, rather, it should rebuilt within its current boundaries and the first step is a codification, at least, to avoid such uncertainty. For example, J.C. Smith indicates that there is a need to provide an urgent codification of such comprehensive liability and that such codification should formulate such rules in terms of the derivative theory. This concept is an assurance that accessorial liability does not impede or threaten legitimate social activities that the new proposal No. 131 might cause. *ibid.*

oblique intention) to avoid extending the law to unnecessary situations, as mentioned above, and at the same time, to be similar to those other inchoate offences such as attempt, conspiracy and incitement.

(C) Innocent Agency ⁴²

According to G. Fletcher, the doctrine of innocent agency (or perpetrator-by-means as he has described it), operates outside accessorial liability because it deals with the liability of principal offenders.⁴³ In fact, such a doctrine is an exception to the definition of the principal in that he is the most immediate cause of the *actus reus* and is to be considered as part of the liability of the principal offender notwithstanding that it is constructive in nature based on the assumption that the law, at this point, considers and treats an accessory as a principal offender. Surprisingly it seems that it does not yet have a universal definition because it differs from one case to another and this is reflected in legal commentary, as I shall discuss below.

It was assumed that the notion of a *constructive* principal that operates under the doctrine of innocent agency only related to a situation when C encourages or assists P, who lacks the required *mens rea*, to commit an offence. C is considered to be a principal because P is exempt from liability, and because the restriction implicit in the derivative theory that there must be a principal; C then must be considered a

⁴² *R v. Tyler* (1838) 8 C&P 616; *R v. Michael* (1840) 2 Mood CC 120; *R v. Manley* (1844) 1 Cox CC 104; *R v. Bannen* (1844) 2 Mood CC 309; *R v. Bull and Schmidt* (1845) 1 Cox CC 281; *R v. Clifford* (1845) 2 Car & Kir 202; *R v. Blaesdale* (1848) 2 Car & Kir 765; *R v. Butcher* (1858) Bell CC 6. See: Halsbury's Laws of England (4th ed. 1990) Vol. II (I), pp. 42-52.

⁴³ Fletcher, G., *Basic Concepts of Criminal Law* (1998), Oxford: Oxford University Press. p. 197.

constructive principal. The authority for this is in *R v. Cogan and Leak* (1975).⁴⁴ L encouraged C to have intercourse with his wife, who did not consent. C mistakenly believed the contrary. C's conviction, as perpetrator of the rape, was quashed by the Court of Appeal, on the ground of his defence that he honestly believed the wife to be consenting, a matter which had not been left to the jury. This left the court with the problem of there being no principal offender, which under the derivative theory might lead to L being acquitted. To avoid this, the Court of Appeal applied the doctrine of innocent agency to secure L's conviction.

In this regard, Bronitt indicates that the doctrine of innocent agency has emerged largely to deal with the negative consequences of derivative liability, and that it is a legal fiction which strains the notion of human agency and causation in the criminal law almost to breaking point.⁴⁵ Further, it is possible to say that the situation is rather different if the actual principal is exempt due to reasons other than lack of mens rea, which means that the person who provides aid or encouragement might be considered as an accessory. This was the issue in the case of *Bourne* (1952).⁴⁶ C was convicted of abetting his wife P to commit buggery with a dog. P, under the law, was a principal, but she was exempt because of the defence of duress. The Court of Appeal held that the defence of duress in relation to P did not elide C's guilt as an accessory.

⁴⁴ *R v. Cogan and Leak* [1975] Q.B. 217; [1975] 2 All ER 1059.

⁴⁵ Bronitt, S., "Parties to a Crime" <http://law.anu.edu.au/criminet/notes.html/>.

⁴⁶ *Bourne* [1952] 36 Cr. App. Rep. 125.

This area of law is very unclear, and because of this the English Draft Criminal Code (which was supposed to codify the common law and not to invoke new principles) indicates that a person is guilty of an offence if he procures, assists or encourage act or acts done by another who is not guilty himself of an offence because he is under ten years of age, or does not possess the required mens rea, or has a defence.⁴⁷ It appears that the reason for this approach is the sheer difficulty of codifying this area of law. Consequently, in the light of the English Draft Criminal Code, one might define an innocent agent as 'a person who commits the actus reus of an offence but is himself devoid of responsibility either by reasons of incapacity, lack of mens rea, or because he has a defence'.⁴⁸ However, there are problems in applying such a definition, such as, some crimes do not allow, both in terms of legal elements and language, certain categories of person to be punished as principal offender; an unmarried person cannot be called a principal in bigamy; a woman cannot be called principal in rape.

⁴⁷ English Draft Criminal Code 1989, Vol. 1, s. 26 (c). The LC. No. 131 indicates that the drafters of the English Criminal Code had great difficulties in determining the scope of the doctrine of innocent agency because the decisions of *Cogan & Leak* and *Bourne* have defects in their justification but acknowledging, at the same time, that the decision of *Bourne* should be discussed under the doctrine of innocent agency. LC. No. 131p. 30; By contrast, the LC. No. 43 indicates that the following represented the law in 1972: "(1) A person acts through an innocent agent when he intentionally causes the external elements of the offence to be committed by (or partly by) a person who is himself innocent of the offence charged by a reason of lack of a required fault element, or lack of capacity. (2) A person is not guilty of committing an offence through an innocent agent when (a) the law provides or implies that the offence can be committed only by one who complies with a particular description which does not apply to that person, or specifies the offence in terms implying personal conduct on the part of the offender; or (b) the innocent agent acts with the purpose of preventing the commission of the offence or nullifying its effects." LC. No. 43, proposition 3, pp. 14-15.

⁴⁸ Card, R., *Criminal Law* (1995), *op. cit.*, p. 550. This, however, has not been declared by English courts to be a definition of the theory.

In *D.P.P. v. K & B* (1997)⁴⁹ two girls, aged 11 and 14, procured the rape of V by P, (an unknown person); they were charged with, *inter alia*, aiding, abetting, counselling and procuring P to rape; P was or might be under the age of 14 and therefore *doli incapax*. The stipendiary magistrate was of the opinion that the act had amounted to the offence of rape. However, two issues did not support the conviction of K & B. Firstly, the prosecution had failed to negate *doli incapax* in relation to the boy. Secondly, K & B were females, and thus, could not be convicted as principal offenders. They were therefore entitled to be acquitted of the charge of aiding and abetting. The prosecution's main argument in appeal was that the magistrate's decision was wrong because the gender of K & B was irrelevant and they should be convicted of aiding and abetting as procurers.⁵⁰ The Court of Appeal held that:

“...Here the fact that the magistrate had found that the prosecution had failed to rebut the presumption of *doli incapax* in the principal did not preclude the respondents from being capable of committing the offence of procuring the rape. The actus reus had been proved and the respondents had had the requisite mens rea namely the desire that the rape should take place and the procuring of it.”⁵¹

What is understood from the above case is that some crimes require certain classes to commit the actus reus as principal offender, (such as man in rape; driver in a driving offence). This indicates that the use of the doctrine of innocent agency is inappropriate in this regard. However, this does not mean that secondary parties are exempt from responsibility; they can be convicted as procurers of the offence

⁴⁹ *D.P.P. v. K & B* [1997] Cr.App.Rep. 36.

⁵⁰ *ibid.*

⁵¹ *ibid.* pp. 36-7. See, for example, *Millward* [1994] *Crim. LR* 527, where the Court of Appeal used the term procure, (although the general charge was aiding, abetting, counselling and procuring as it is usually under accessorial liability), to convict a person as an accessory to the offence of causing death by reckless driving; *Walters v. Lunt* (1951) 35 Cr. App. Rep. p. 94.

(despite the fact that their general charge was aiding, abetting, counselling and procuring the offence in question). Procurement, as was indicated in chapter 1, requires establishing both elements of causation and intention (which is not the case in aiding, abetting, or counselling). One might view such use of procurement as a lawful trick used by the court to avoid any linguistic misleading or inappropriate terms (such as a principal in rape to a female) having, at the same time, some related criteria of the element of the guilt of the principal (causation and intention.)⁵²

The law at this point should consider all the above patterns, which the doctrine of innocent agency might operate under (lack of mens rea; reasons other than mens rea; or when the actual principal has a defence) under the liability of the principal offender, (an approach taken by the English Draft Criminal Code).⁵³ Or, as seems much more appropriate, it could adopt the formula used by the M.P.C., such as causing an innocent agent to commit a crime.⁵⁴ Alternatively, since it appears that many now favour defining accessorial liability in terms of encouragement and assistance, one might describe such activity as procurement (instead of causing) of an offence, whether based on accessorial liability; principal liability, or, (although not desired), as a separate offence form of criminal complicity.

⁵² However, as Ashworth indicates, the Divisional Court left the possibility that a woman can be convicted as a principal in rape by applying the doctrine of innocent agency. Ashworth, A., *PCL* (1999), *op. cit.*, p. 453 at note 136.

⁵³ Vol. 1, cl 26 (1).

⁵⁴ M.P.C. in s. 2.06 mentioned in Ashworth, A., *PCL* (1999) *op. cit.*, pp. 451-2.

(D) Defences available to accessories

General defences:

Although a person might commit both the actus reus and mens rea of a crime, he may not be convicted of the offence because he has a defence whether by a common law or a statute.⁵⁵ Some of these defences might lead to acquittal (*complete defences*) such as self defence; others, such as diminished responsibility, might lead to reduce liability for the offence; or might lower the sentence (*partial defences*). In addition, these defences can be viewed as applied to all offences (*general defences*), others are *specific defences* being applied to certain offences such as the defence of provocation which is available only to murder.⁵⁶ Moreover, some offences have a particular defences attached to them, such as permission and protection in criminal damage.⁵⁷

⁵⁵ Elliot, C & Quinn, F., *Criminal Law* (3rd ed. 2000), Longman. pp. 239. Deliberate departure by the principal, is a defence from which an accomplice might benefit from to avoid conviction. The authority for this is in *R v. Saunders and Archer* (1573) 2 Plowd 473. In this case, Saunders asked Archer on how to kill his wife; the advice was that to kill her by poison. Saunders gave the wife a poisoned apple, which she gave to their daughter who died after eating it. However, Saunders did not intervene to stop her eating the poisoned apple. He was found guilty of murder but the liability of Archer reminded questionable for two years until the Court acquitted him from the charge of murder because he was not present, which suggested that assent to murder could not be established. Clarkson, C. and Keating, H., *Criminal Law*, (1998), *op. cit.*, pp. 567-8, summarise the interpretations made to the judgement: (1)- the narrow interpretation implies that accessories will not be liable if the principal deliberately chooses another victim, as it was the case in Saunders watching his daughter eating the poisoned apple. (2)- the broad interpretation suggests that an accessory will only be liable if he expressly authorises or foresees the harm that occurs. Peter Gillies observes that the defendant is not liable as an accessory if he instigated, encouraged or assisted principal to commit one crime but the latter ends up committing another which was not in the contemplation of the accessory. Thus, the test is to find out the actual contemplation of the accessory in order to link him with what has the principal done beyond their intended (or contemplated) crime. Gillies, P., *Criminal Complicity*, *op. cit.*, pp. 151-2. The English Draft Criminal Code 1989, in cl. 27. 1(c) and 5, properly takes a similar position. *Powell; English* might support the above view of contemplation in its general conclusion but it did not totally clarify such an issue. See: chapter 4.

⁵⁶ Simpson, F., *Blackstone's Police Manual: Crime 1998/99* (1998), London: Blackstone Press Limited. pp. 17-22.

⁵⁷ *ibid.* The defence of duress is not available to murder: *R v. Howe* [1987] AC 417 or attempted murder: *R v. Gotts* [1992] 2 AC 412. The current defences under English criminal law are: Automatism (involuntary action). Intoxication: there is no general defence for intoxication but involuntary intoxication might indicate that a defendant lack the required mens rea for the offence. Insanity: a person claiming to be insane will be judged against the M'Naghten rules, which require

One needs to go back to common law or a statute to find the circumstances that such a defence might operate under.⁵⁸ The reason for this is that it is agreed, although not totally clear, that an accessory can rely on one or more of the general defences, if he thinks he is so entitled. This view is supported by the English Criminal Draft Code which clearly indicates that, unless otherwise provided, standard criminal law defences (general defences), are applied to both principals and accessories. The commission expressly indicates that:

“Paragraph (b) makes clear that defences apply equally to principals and accessories. This facilitates the drafting of provisions creating defences, which it may be convenient to express, as offences themselves are commonly expressed, in terms referring to the act of the principal. The common law (which governs the liability of accessories) undoubtedly assumes such defences to be generally applicable although we are unaware of explicit authority on the point. Paragraph (b) means merely that a person may rely on a defence to avoid liability as an accessory if he himself satisfies its requirements. It does not mean, as clause 27 (1) (c) makes clear, that he can take the benefit of a defence the requirements of which are satisfied by another who would but for the defence be guilty as a principal. Indeed, by assisting and encouraging such another he may himself be guilty as a principal.”⁵⁹

that if a defendant, at the time of the commission of the offence, was under a defect of reason, disease of the mind, or did not know the nature and quality of the act he was doing; or, he did not know that what he was doing was wrong, he is insane. The other defences are mistake, necessity ‘duress of circumstances’, defence of self, others or property, infancy: a child under the age of 10 is presumed to be *doli incapax* (incapable of evil), preventing crimes: the Criminal Law Act 1967, s. 3 (1) indicates that: “A person may use such force as is reasonable in the circumstances in the preventing of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large.” See: Simpson, F., *op. cit.*, pp. 17-21. It should be noted that *Superior order* is not a defence to a crime, thus an employee, who does a criminal act cannot rely on the fact that he was only obeying the instructions of his employer. Cf. the Court of Appeal decision (Civil Division) in *R v. Salford Health Authority* [1988] 2 W.L.R. 442, a secretary who typed a letter arranging illegal abortion would not be guilty of aiding and abetting because she was ordered, by her employer, to do that. See: Smith, J.C., *Justification and Excuse in the Criminal Law* (1989), (The Hamlyn Lectures Fortieth Series), London: Stevens & Sons. p. 70.

⁵⁸ This is, in fact, huge area of common law, and would take enormous efforts to go into details of how a particular defence affects accessory liability, which is something beyond the scope of this thesis. I recommend that the defence in both England and UAE, or even the prosecution, should investigate such defences which might either lead to acquittal, reduce liability or lower the sentence if convicted.

⁵⁹ Vol. 2, p. 204; cl. 25 (b), Vol. 1. LC. No. 131 similarly suggests the same in their report, paragraph 4.100.

It must be noted that in relation to the defence of duress (a defence available to a person who commits a crime because he was acting under a imminent threat of death or serious injury to himself by another) this is not available in the offence of murder whether the defendant is a principal or an accessory. The reason for this is that the law assumes that an ordinary person is expected not to kill, even in circumstances of this nature.⁶⁰

Withdrawal:⁶¹

Unlike the position in attempt, English criminal law recognises a defence of withdrawal in criminal complicity, which might lead an accomplice to escape liability if he decides not to take part or any further part before the offence is committed.⁶² It is possible to say that the ambit of this defence is not totally clear because this area of law is vague, and seems to work under general principles (such as that there must be timely communication, to serve unequivocal notice, or to take

⁶⁰ *Howe* [1986] Q.B.626; [1987] AC 417; Elliot, C & Quinn, F., *Criminal Law* (3rd ed. 2000), pp. 278-9; *Cf. Lynch v. D.P.P. for Northern Ireland* [1975] AC 653; Smith, J.C., *Criminal Law* (1996), *op. cit.*, pp. 240-9.

⁶¹ Probably the first authority for withdrawal was *Saunders & Archer*. The Court said: "If I command one to kill JS and before the fact done I go to him and tell him that I have repented and expressly charge him not to kill JS and he afterwards kills him, there I shall not be accessory to this murder, because I have countermanded my first command, which in all reason shall discharge me...but if he had killed JS before the time of my discharge or countermand given, I should have been accessory to the death, notwithstanding my private repentance." *Saunders & Archer* (1573) 2 Plowd 473 at 476 mentioned in LC. No. 131 pp. 53-4; Roskill L.J. in *R. v. Becerra and Cooper* (1975) 62 Cr. App. R. 212 referred the authorities to withdrawal first stated in *Saunders and Archer* (1573) 2 Plowd 473 at 476, *Edmeads and Others* (1828) 3 C & P 390 at 392, *Croft* (1944) 29 Cr. App. Rep. 169; See: Smith, K., *MTLCC*, *op. cit.*, p. 251.

⁶² Elliot, C & Quinn, F., *Criminal Law* (3rd ed. 2000), *op. cit.*, p. 224. This defence is not available in an attempt case to a defendant who voluntarily chooses not to carry out a crime. *ibid.* p. 194. It must be noted that although withdrawal is a defence to accessorial liability, a defendant might be liable for inchoate offences of conspiracy or incitement. Gillies, P., *Criminal Complicity*, *op. cit.*, p. 175; Smith, J.C., *Criminal Law* (1996), *op. cit.*, p. 158; Smith, K., *MTLCC*, *op. cit.*, p. 252 at note 17.

all reasonable steps to prevent the crime) in order to help the jury to decide whether or not to grant a defendant such a defence.

The possible reason for such broadness or lack of clarity is that the courts either want to leave this defence under broad terms, in order to have some measure of flexibility, or that there is a failure by the courts in placing those broad terms to accommodate the issues of firstly, encouragement on one hand and assistance on the other, and secondly the time withdrawal occurs, whether some time or shortly before the commission of the offence by the principal.⁶³ The most cited case regarding withdrawal is *R v. Becerra and Cooper* (1975).⁶⁴ In this case, three accomplices B, C, and another broke into a house to steal B gave C a knife to be used in case of interruption of the plan. V heard noise coming from below and decided to go down stair. B said ‘let us go’, jumped out of the window and run away. C stayed and stabbed V with the knife. Both were convicted of murder. B appealed that although

⁶³ Case law regarding withdrawal is not clear and does not present a satisfactory picture on how this defence works or should work: in *Philips* (1848) 3 Cox C.C. 225, the defendant agreed with others to assault the victim but withdrew shortly before the commission of the crime. Nevertheless, he was convicted. Peter Gilles suggested that the Court, in the above case, required more positive steps from the accessory to neutralise the previous encouragement. A similar conclusion was reached in *Goodspeed* (1911) 6 Cr. App. R. 133. As Gillies suggests, these two cases indicate that more positive action is required rather than merely communication of the intention of withdrawal. Gillies, P., *Criminal Complicity*, *op. cit.*, p. 175; *Croft* [1944] 1 KB 295: suggests that repentance without action is insufficient; Smith J.C. *Criminal Law* (1996), *op. cit.*, p. 159; *Fletcher* [1962] *Crim. LR* p. 551: merely saying ‘don’t do...don’t be fool’ was not considered by the Court of Appeal to be an effective withdrawal to conspirator in arson. In *Grundy* [1977] *Crim. LR* 543: C provided the principal with information to commit burglary six weeks before its commission but for two weeks he tried to persuade them not to commit it. The Court of Appeal accepted this was an effective withdrawal and it was left to the jury. In *Baker* [1994] *Crim. LR* 444: the Court of Appeal did not infer withdrawal when the accessory said to the principal ‘I’m not doing it.’ See: Smith J.C., *Criminal Law* (1996), *op. cit.*, p. 159 who also points out that such action must be voluntary. It has been pointed that when there is more than one principal in encouragement, effective communication to serve unequivocal notice must be communicated to all those who have been encouraged by the accessory. Smith J.C., *Criminal Law* (1996), *op. cit.*, p. 158; LC. No. 131 p. 55; *Saunders and Arche* and *Croft* (above mentioned), are taken as authorities to indicate that ‘unequivocal notice’ requires express notice of withdrawal. Smith K., *MTLCC*, *op. cit.*, p. 255.

⁶⁴ *R v. Becerra and Cooper* (1975) 62 Cr. App. Rep. 212.

there was a common design he was entitled to ask for acquittal because the fact of the case indicates that he withdrew from the common design and therefore should not be convicted of murder. The Court of Appeal dismissed his appeal. Roskill L.J. delivered this statement:

“Where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desired to continue in it. What is “timely communication” must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.”⁶⁵

This case does not help a great deal to state clearly what the law requires. This has led commentators to avoid this vagueness by suggesting a more direct and simple formulation. For example, Andrew Ashworth clarifies the law regarding withdrawal by saying:

“The essence of withdrawal in complicity is that the accomplice must not only make a clear statement of withdrawal and communicate this to the principal, but must also (if the crime is imminent) take some steps to prevent its commission. The closer the principal offence’s is to commission, the more active the intervention is required of the accomplice for effective withdrawal.”⁶⁶

What is indicated by Ashworth is a very simple example on how English courts treat (or should treat the subject). However, such straightforwardness is something that one can not achieve by distorting the language of the courts. For example in the above case the trial judge suggested that in the circumstances surrounding the case,

⁶⁵ See: *Rook* (1993) 97 Cr. App. Rep. 327 at 333, which takes a similar approach and also is taken to indicate that absence on the day of the commission of the crime does not amount to effective withdrawal. Clarkson C. Keating, H., *Criminal Law* (1998), *op. cit.*, p. 565.

physical intervention was the only way that the defendant might succeed with a defence of withdrawal. However, The Court of Appeal said that it was not necessary that it should discuss whether the trial judge was right or wrong and that to establish withdrawal as defence in such circumstances, the defendant should, at least, take all reasonable steps to prevent the commission of the crime which he had agreed that the others should commit. One clearly would understand that the Court did not want to restrict the law at this point to one conclusion; perhaps it wanted the defence to be more flexible and to differ from one case to another. This might be an advantage; simplicity, as Ashworth pointed above, is preferable at least in so far as it shows how the defence of withdrawal operates. Moreover, although there is no authority on this, it appears that the requirement of establishing effective withdrawal may differ from encouragement and assistance. Gillies, for example, thinks:

“English Courts have almost always favoured the idea that the defendant must take effective steps to undo the promotional significance of his own act of incrimination, if he is to escape liability for the crime... This, it is submitted, is as the law should stand. If the defendant has performed a subsidiary or coequal act of encouragement...then it will often happen that he can do this simply by communicating to the prospective principal his desire to not to see the crime proceed. Where he assisted the principal in a vital way (by supplying information to a housebreaker and thief, for example, as to the location of valuables), or has instigated a person who was otherwise without criminal intent to commit a crime, then a mere expression of disinterest will frequently not suffice to neutralise the defendant’s act of incrimination.”⁶⁷

⁶⁶ Ashworth, A., *PCL*, (1999), *op. cit.*, p. 454.

⁶⁷ Gillies, P., *Criminal Complicity*, *op. cit.*, p. 179. Glanville Williams appears to distinguish incitement from assistance in relation to withdrawal. He thinks that the accessory who incites a crime needs expressly and clearly to countermand the crime or withdraw his assent in due time before it is committed. He thinks that such express withdrawal can be assumed from his conduct rather than verbal behaviour. In assistance, he thinks that accessories must do their best to prevent the commission of the crime and that the best way of doing this might be by warning the victim or taking other means short of informing the police. *TBCL*, *op. cit.*, pp. 363-4. Further commentary comes from R. Card who indicates that in relation to assistance the accessory can withdraw, prior to the commission of the offence, by communicating his intention to the principal. However, if it occurs shortly before the commission of the crime, something more is required, depending on the surrounding circumstance, such as physical intervention. Card, R., *Criminal Law* (1995), *op. cit.*, p.567.

This opinion of Gillies probably represents the law on this point.⁶⁸ However, although he was right in saying that in instigating a person who was otherwise without criminal intent to commit a crime a more positive step is required, this is possibly not the case in English law, which does not require accessorial instigation to be a *but-for* factor in the liability of the principal.

Accordingly, effective withdrawal may depend on the type of participation. Thus in encouragement it is sufficient for the accessory to communicate his intention to withdraw to the principal, while in assistance, more is required than merely verbal communication of intention to withdraw. Effective withdrawal can easily be determined if it occurs in the preparatory stage of the crime, but where the crime is in its later stage the only way to withdraw requires physical intervention to stop the principal from completing the crime.⁶⁹ If the principal does more in what amounts to be an attempt, it is not possible to establish withdrawal but punishment may be mitigated.⁷⁰ On this, Smith observes:

“Although no more than hinted at in *Becerra*, implicit in the defence appears to be a proportionality or relational condition whereby the greater the accessory’s involvement in an enterprise the more substantial the effort needed to remove himself from liability. This is broadly responsible for the probable distinction between cases of encouragement and those where

⁶⁸ It must be noted that there is no authority or that the authority is not clear on this, especially in relation to assistance. For example, the drafters of the 1989 English Draft Criminal Code were unclear of the authorities of this area of law (the team were supposed to codify the case law in a single code). Consequently, they restricted the application of the defence of withdrawal to encouragement. This shows how much uncertainty surrounds withdrawal. See the English Draft Code in Vol. 2 p. 211. By comparison, LC. No. 43 indicated that communication of intention to withdrawal to the principal is enough whether occurs in instigation or assistance. One should note that withdrawal under their proposal is a matter of mitigation rather than exemption from criminal complicity. LC. No. 43 Proposition 9.

⁶⁹ Smith, J.C., *Criminal Law* (1996), *op. cit.*, pp. 158-9; LC. No.131 p. 54.

⁷⁰ *Rook* (1993) 97 Cr.App.Rep. 327 at 334; Ashworth, A., *PCL* (1999), *op. cit.*, p. 453.

material assistance has been supplied... Whilst withdrawal from situations where material aid has been furnished is implicitly recognised by English case law, quite how much more than an express countermand is necessary lacks authority.”⁷¹

In the absence of clear justification for the defence of withdrawal, legal commentators have tried to provide an explanation on why withdrawal is allowed as a defence. K Smith indicates that this area of law is clouded with uncertainty as to what determines the scope of withdrawal as a defence. He suggests two justifications: firstly, the defence reduces the chance that the principal will commit the offence. Secondly, the defence might be based on the notion that the offender has abandoned his involvement in order to show that he is less socially dangerous. In the first case, more action is needed, while in the second a lesser amount of repentance can be sufficient to establish withdrawal.⁷²

One might well suggest that criminal law should require an accomplice, in order to benefit from the defence of withdrawal, to prevent the commission of the crime he had either encouraged or to the commission of which he had contributed. This fixed or strict standard means that the defendant must either prevent the offence from

⁷¹ Smith K, *MTLCC, op. cit.*, pp. 257-8.

⁷² *ibid.* pp. 252-3. It seems that he does not favour justifying withdrawal on the basis of ‘a lack of actus reus’ because this brings up the issue of causation, which is not required in deciding the liability of accessories. He thinks that a coherent discussion of withdrawal as a defence must be proceed on the basis of recognising some means of acquittal beyond a claim of no actus reus. *ibid.* p. 252. However, it must be pointed out that justification can be based also on ‘a lack of actus reus’ regardless of causation. The question is: does causation constitutes the whole of the actus reus or is it, as it appears, only an element of the actus reus. The latter is true which means that justifying withdrawal on ‘a lack of actus reus’ can also be correct regardless of causation which the law does not require. Moreover, such standard of justification can be based on a derivative theory, which indicates that accessorial activities (although some actions might constitute an inchoate offence of incitement or conspiracy) require the committing of the crime by the principal. This means that those activities, especially in assistance, are not criminal in themselves but are criminal because of their link to liability of the principal.

being committed, inform the police or, to a lesser degree, warn the victim. Is this the best option regardless of the time factor in which withdrawal might occur? On this issue K Smith suggests:

“Limiting exculpatory behaviour to actions directed at preventing the offence could be seen as incorporating into the defence a form of penalty against the accessory for his initial voluntary involvement, or a charge for the concession of granting the defence. In practical terms, such a condition forces a withdrawing accessory into either warning the targeted victim or law enforcement authorities of the planned offence both of which approaches with their risks of exposure might prove unattractive to repentant accessories. However, despite this, it might be thought that only where withdrawing actions are directed at preventing the offence is the chance of thwarting the principal sufficiently meritorious to warrant excusing the accessory. Such calculations are of a very fine order and necessarily highly speculative. Furthermore, it is certainly arguable that legitimate concerns over an accessory properly *earning* his exemption (at least in respect of his *form* of withdrawal) are adequately met by requiring that he took ‘all reasonable steps’ or ‘makes proper effort’ to withdraw. Depending on the circumstances, there may be no option for withdrawal other than by directly or indirectly attempting to prevent the offence’s commission. This would be true of the provision of useful information. General use of a reasonableness test carries the flexibility to achieve an appropriate correlation circumstances of the complicity and which should exempt the accessory between the nature and particular the type of countermanding action.”⁷³

It might be concluded, then, that it is necessary for courts, (or in the case of any future codification of the doctrine), to pay attention to two points: first when the crime is still some way from being committed, courts should distinguish between incitement and assistance, in that in the former, communication of intention to withdraw is enough, while in the latter the defendant should also take what steps are necessary (depending on the facts of each case) to prevent the commission of the offence, such as returning the provided materials or resorting to other means which declare his intention to withdraw. Secondly, if the crime is about to be committed,

both incitement and assistance should be treated as requiring reasonable steps to prevent the commission of the offence. In general, simplicity is required and a notice of the distinction should be made between encouragement and assistance. The time factor should be taken into account.

(E) Victims:

The issue of victims as parties to a crime is well known one in criminal law commentary and in case law. English criminal law distinguishes between willing and unwilling victims by considering the willing victims in statutory crimes such as sexual offences, parties to crimes committed upon them. However, some of those willing victims are exempt from liability because of protection provided by the law.

J.C. Smith summarises this rule as follows:

“Where a statute has been designed for the protection of a specific group, those members of that group cannot become accomplices to the crimes committed upon them, even where they have given their consent.”⁷⁴

The previous rule in fact seems to be an exception from a general rule in complicity, which states that:

“It is unnecessary for the crime created by statute to provide a provision that it shall be an offence to aid and abet, counsel or procure.”⁷⁵

Strictly speaking, it is understood that willing victims in statutory crimes are parties to the crime committed upon them only if they have not been excluded or been given

⁷³ *ibid.* pp. 258-259.

⁷⁴ Smith, J.C., *Criminal Law* (1996), *op. cit.*, pp. 160-2.

⁷⁵ *ibid.*

protection by statute.⁷⁶ *Tyrell* (1894),⁷⁷ (giving rise to what known as the *Tyrell* Principle), is a leading case on this point: D1 was a girl between the age of 13-16 tried and convicted on an indictment charging her with having unlawfully aided and abetted, counselled and procured D2 to commit unlawful carnal knowledge of her. It was proved that she actually did aid and abet, solicit or incite the man to commit the misdemeanour, which is punished by s.5 of the Criminal Law Amendment Act 1885. However the conviction was quashed and a principle was set out in the judgement:

“It is not a criminal offence for a girl between the ages of 13 and 16 to aid and abet a male person in committing, or to incite him to commit, the misdemeanour of having unlawful carnal knowledge on her contrary to section 5 of the Criminal Law Amendment Act 1885.”⁷⁸

Lord Coleridge C.J in giving judgement said:

“The ...act was passed for the purpose of protecting women and girls against themselves. At the time it was passed there was a discussion as to what point should be fixed as the age of consent. That discussion ended in a compromise and the age of consent was fixed at 16. With the object of protecting women against themselves the Act of parliament has made an illicit connection with girls under that age unlawful; if a man wishes to have such an illicit connection he must wait until the girl is 16, otherwise he breaks the law; but it is impossible to say that the Act, which is silent on aiding or abetting, or soliciting or inciting, can have intended that the girls for whom the protection was passed should be punishable under it for the offences committed upon themselves.”⁷⁹

⁷⁶ *ibid.*

⁷⁷ *Tyrell* [1894] Q.B. p. 710. Taken by the English Draft Criminal Code in cl. 27 (7) as an authority to exempt such type of victims from accessorial liability.

⁷⁸ *Tyrell* [1894] Q.B. pp 710-712. Part I, in which s. 5 comes, is headed “Protection of Woman and Girls.”

⁷⁹ *ibid.* pp. 710-712.

Thereafter, the *Tyrell* principle has been adopted in the later cases, an example of which was *R v. Whithouse* (1977) where it was held that a 15 year old girl cannot be an accessory to incest because she was the victim of the offence.⁸⁰

At this point, it must be emphasised that the *Tyrell* principle applies only to statutory offences which give protection to certain people, such as the young or mentally subnormal, from being an accessory to crimes that they were a willing victim.⁸¹

Another point made by J.C. Smith is that since the *Tyrell* principle applies only to the willing victim of the crime (as mentioned before) it would be a true decision to convict an underage girl of abetting a man to have sexual intercourse with another under age girl.⁸² Moreover, a prostitute can be convicted of abetting in the keeping of a brothel and living off the earnings of another prostitute.⁸³

(F) Other related issues:

Under this heading it is proposed to point out some defences recommended by the English Draft Criminal Code 1989, which might be included in any future statutory drafting of criminal complicity. The draft says in cl. 27. (6) that:

⁸⁰ *R v. Whithouse* [1977] Q.B. 868.

⁸¹ Card. R., *Criminal Law* (1995), *op. cit.*, p. 565.

⁸² Smith, J.C., *Criminal Law* (1996), *op. cit.*, p.162; Curzon, L.B., *Criminal Law* (8th ed. 1997) M&E Pitman Publishing. p 69.

⁸³ Smith, J.C., *Criminal Law* (1996), *op. cit.*, p.162. The victim rule is under attack from some criminal law scholars due to its uncertainty the ambiguity. For example, Glanville Williams has argued that why protection is given to girls under sixteen, sometimes the underage girl is more experienced than the youth but the law does not come into this question. He also says that the victim rule is just a wider proposition that courts may find a person to be excluded from complicity provisions by implication, for the same reasons as the victim rule. Williams, G., "Victims and Other Exempt Parties in Crime" (1990) 10 *Legal Studies* 245-2. LC. No 131 recommended that this defence should be only available in assisting crimes. Paragraph 4.103.

“ A person is not guilty of an offence as an accessory by reason of anything he does-

- (a) with the purpose of preventing the commission of the offence; or
- (b) with the purpose of avoiding or limiting any harmful consequence of the offence and without the purpose of furthering its commission; or
- (c) because he is under an obligation to do it and without the purpose of furthering the commission of the offence.”

(a) Purpose of preventing the commission of an offence:

The intention of cl. 27. s. (6) (a) is to link this defence to law enforcement in the case of police informer or undercover agent, who assists the commission of an offence but for the purpose of bringing its offenders to trial. What is understood from the above clause is that this defence properly should be available to law enforcement or those who work under their supervision. Doubts arise on two points: first, whether an ordinary person pretending to act with a criminal in order to prevent the commission of the offence should have such defence. The above clause implicitly does not distinguish between law enforcement and ordinary persons. By contrast, the drafters of the Draft Code used the term *law enforcement*, and this would suggest that this defence is linked only to law enforcement or who works under their supervision.⁸⁴ However, if it is applied to both, it is possible to say that an ordinary person would obviously have great difficulties in establishing such a defence. Second, the above clause does not distinguish between the modes of accessorial liability and implicitly suggests that it is available to all three forms mentioned by the Draft Code (assistance, encouragement, and procurement). However, the drafters of the Code used assistance as example of the defence in their commentary. It appears that this defence is not needed if the criminals did not commit the offence; it rather works as a

⁸⁴ English Draft Criminal Code 1989 drafters' commentary in Vol. 2 par. 9.33, p. 209.

defence if such offence is committed.⁸⁵ Currently there is no such recognised defence of law enforcement under English law.⁸⁶ It seems that case law here, although it does not recognise this defence, acknowledges that police working behind the scene is part of their job to investigate crimes and bring criminals to trial.⁸⁷ It seems that it is lawful for law enforcement agencies to take part in an offence that has already been planned and is going to be committed, if such participation is for the purpose of trapping the offender.⁸⁸ However, dishonest law enforcement agents who aid and abet a crime committed by another who would not otherwise commit the offence are accessories to the crime in question.⁸⁹ English law, although it does not recognise entrapment as defence, demands a fair trial by indicting in s. 78 of Police and Criminal Evidence Act 1984 that a judge is entailed to exclude evidence that might have an adverse effect on the fairness of the proceeding.⁹⁰

b) Purpose of avoiding or limiting any harmful consequence of the offence:

It is possible to say that the intention of the team of the Draft Code to provide this defence is to avoid problems of the low level of mens rea required for accessorial liability. It is not clear how this defence would work but it seems that the reason for

⁸⁵ *ibid.*

⁸⁶ LC. No. 131 par. 2.91 p. 51.

⁸⁷ The situation now is that English courts exempt law enforcement officers, and those who work under their supervision, from accessorial liability if they work undercover with criminals because of their duty to mitigate the consequences of an offence. See: Lord Parker CJ in *Birtles* [1969] 1 W.L.R. 1047 at 1049, mentioned in LC. No. 131 par. 2.93 p. 52.

⁸⁸ *R v. McCann* (1977) 56 Cr. App. Rep. 359; *R v. McEorlly* (1973) 60 Cr. App. Rep. 150; Halsbury's Laws of England, Vol. II, *op. cit.*, p. 48; *Clarke* (1984) 80 Cr. App. Rep. 344. *Cf. Smith* [1960] 2 Q.B. 423; *Yip Chiu-Cheung* [1995] 1 AC 111.

⁸⁹ Lord Salmon in *R v. Sang* (1980) 69 Cr. App. Rep. 282 at 296.

drafting it to cover similar to that situations of *Gillick* (mentioned in Chapter 3).⁹¹ Again the general reading of this defence does not distinguish between the modes of accessorial liability, although the drafting team in its commentary used assistance to describe the actus reus.⁹²

c) Belief in legal obligation:

The drafting team of the Draft Code provided this defence because there is controversy surrounding case law where accessorial liability arises in those cases where a person in possession of an article hands it to its owner with the knowledge that he might commit an offence with it.⁹³ Thus, if someone returns a knife belonging to P believing that he is under legal obligation to do so, he is not responsible as an accessory although he contemplates that P will use it to commit an offence.

⁹⁰ Smith, J.C., *Criminal Law* (1996), *op. cit.*, p. 164. There is no defence of entrapment in English law: *R v. Sang* [1980] AC 402, 69 Cr. App. Rep. 282, but it might mitigate the sentence: *Mackay and Show* [1992] *Crim. LR* 602, quoted in Card, R., *Criminal Law* (1995), *op. cit.*, p. 566.

⁹¹ The team provided the following examples of the ambit of this defence: The supply of condoms to prisoners or sterile hypodermic needles to drug abusers, if done solely for limiting the risk of sexual diseases. See: the drafters' commentary in Vol. 2 par. 9.34, p. 209. English Draft Criminal Code 1989.

⁹² *ibid.*

⁹³ *ibid.* at note 52.

(A) Issues related to the liability of the principal offender

Who is the principal offender:

Article (44) of the F.P.C. states that:

“ A principal of a crime is the one who either commits it by himself or is a direct accomplice in its commission. A person shall be a direct accomplice to a crime in the following instances:

First: where he joins another in the committing of an offence.

Second: where he takes part in the committing of an offence that consists of several acts, and he intentionally commits any such act.

Third: where he utilises another person by any means to commit an offence, and that the latter is not responsible, for any reason, under criminal law.”

Thus, under the above article three types of principal offenders are identified: *the single principal*, the *co-principal*, and the *constructive principal* who is acting through an innocent agent. Unlike English law, article (46) of the F.P.C. includes a fourth category by indicating that:

“An accessory by causation shall be considered as a direct accomplice (a principal), provided that he is found at the scene of an offence with intention to commit it if it is not committed by another person.”

It appears that the above article is an extension of the categories of the liability of the principal offender. It is applied to an accessory who, according to a plan made with other accomplices, is a substitute for the original principal who might not commit the offence. For example, when the original principal hesitates to go through with the venture, such a substituted principal will commit the offence instead. It must be

noted that the above article has strict proof requirements, which stipulate that the accessory must be present at the place of the crime, and that he must have an intention not only to be an accessory but also to intervene by committing the offence himself. Thus, his punishment will be similar to the punishment of the principal offender when the law provides a fixed punishment to such type of accomplices.

Legal distinction between principal and accessory:

Actus reus: As in English law, the definition of the offence is the source of liability of the principal offender. Moreover, he must commit the actus reus of the both the main and any collateral crime. In contrast, the actus reus of accessorial liability has to be either or both forms of instigation; conspiracy; and assistance (article 45), and this is only required for the main offence but not is not necessary to any further additional offence.

Mens rea: Like English law, the mens rea required for accessories under the F.P.C. is not the same as the principals. The difference is that under the F.P.C. there must be intention to instigate, conspire or assist the principal in committing the offence.

The derivative nature of accessorial liability: This is a fundamental part of accessorial liability and it is similar to the English law.

Attempt: the same discussion under English law is relevant here.

Jurisdiction: It is generally acknowledged that a person who instigates, conspires, or assists a crime committed outside the territorial jurisdiction of UAE may not be charged of being an accessory unless it is indicated otherwise. By comparison, accessorial actions committed outside the UAE but linked to a crime committed in the UAE are subject to the jurisdiction of the F.P.C. However, the F.P.C. departs from this general rule in some other express articles.⁹⁴

Punishment: Article (47) of the F.P.C. indicates that:

“Any person who participates in an offence, whether a principal or accessory, shall receive the same penalty unless the law provides otherwise.”

This is, in fact, a very strict article, which suggests that all parties are subject to the same penalty. However, it must be noted that in relation to the offences of Islamic *Sharia*, only the principal offenders are subject to the fixed punishment while accessories are punished with less severity.⁹⁵ In addition, the F.P.C. recognise a

⁹⁴ Article (19) indicates that: “This Code applies to any one who commits an act outside the UAE, which makes him a principal or accessory to a crime committed entirely or partly in the UAE.” Article (20) indicates that the territorial jurisdiction of the F.P.C. is extended to be applied to any one, whether a principal or accessory, who commits an act outside the UAE of the following examples: crimes affecting the external or internal security of the State, its constitutional system, (ss.(1)); the protection of the of the currency of the State against forgery, falsification, or counterfeit (ss. (2)); the protection of the of the currency of another country, but is used in the State, against forgery, falsification, or counterfeit (ss. (3)). Moreover, according to article (21) any person, found in the UAE, can be brought to trial according to the F.P.C. if he committed a crime or crimes of: destroying or interfering with an international communication system, drug trafficking, trafficking in women or children, slavery, ‘sea’ piracy, or terrorism. Likewise, the F.P.C. can be extended to cover crimes committed outside the UAE by a citizen, whether a principal or accessory, provided that he or she committed an act or omission that amounts to be a crime in both the UAE and the place of its commission, and that he returns to the UAE. Such extension of the territorial jurisdiction, according to article (24), requires consent to prosecute from the Director of the Public Prosecution. It worth noting that the domestic Penal Code of Dubai in article (42) punishes instigation to commit a crime and conspiracy even though it is intended that the principal crime is to be committed outside the State of Dubai.

⁹⁵ It should be noted that that under the criminal jurisdiction of Dubai, *Sharia* is not applied. However, it seems that Dubai’s courts, even by applying secular laws, moves towards such distinction. For example, the offence of trading in drugs: the principal was sentenced to life imprisonment and the

distinction between the following: material circumstances (those related to the actus reus of an offence such as coercion, carrying weapons in burglary) that either can aggravate or reduce the punishment are applied on all accomplices without requiring knowledge of such circumstances (article 49). In relation to personal circumstance (such as infancy), the situation is rather different. For example, personal circumstances that intensify punishment for an accomplice shall not apply on other accomplices unless they have knowledge of them. Such circumstances that reduce the punishment shall apply only In relation to the concerned accomplice (article 49). Moreover, the mens rea circumstances shall apply only on the concerned accomplice (article 48). It should be noted that these circumstances are not easy to identify and cause a great amount of uncertainty. Perhaps the courts should elaborate the ambit of this category to clear any doubts.

It is clear that this area shares a similarity with English law in this regard. Possibly the difference is that the F.P.C. does not recognise vicarious liability in criminal law and that omission has a minimal bearing on accessorial liability, and third that the causation discussion in relation to accessories is similar to the required standard in the case of the principal offender. Thus, I shall point out other important legal distinctions below.

other accessories with only 3 years. www.albayan.co.ae/albayan/2000/03/19/mhl/10.htm [Arabic]. Cf. in robbery: the principal was convicted with three years and the accessory with also three years. www.albayan.co.ae/albayan/1998/09/17/mhl/13.htm [Arabic].

Hudoud crimes, operating under *Sharia*, are applied only to principal offenders.⁹⁶

This above rule does not apply to nearly all other Arabic jurisprudence, especially Egypt, because *Sharia* does not form part of their criminal law. The situation in the UAE is rather different; apart from the jurisdiction of Dubai, other emirates of the UAE apply Islamic *Sharia* to criminal law matters. D. Wiechman, *et al.* indicate that *Hudoud* crimes are those that are punishable by a pre-established and fixed punishment as found in the holy texts.⁹⁷ This means that these crimes have no minimum or maximum punishments attached to them, and if proved under its very strict standard of proof, no one can change or reduce the punishment applied because it is assumed that they are set by God and are considered as crimes against God's law.⁹⁸

It is safe to say that the liability for above type of crimes is applied only to the principal offenders, which means that accessories are not liable to conviction of these offences. Abudual-Quader Ouda (a well known commentator on *Sharia* and law)

⁹⁶ Properly *Qisas* and *Diyah* crimes are also only applied on the principal offender.

⁹⁷ Dennis J. Wiechman, Jerry D. Kendall, and Mohammad K. Azarian "Islamic Law: Myths and Realities" <http://www.ummah.net/bicnews/Articles/law.htm>.

⁹⁸ The required standard of proof in these offences is best described by D. Wiechman, *et al.*:

"There are some safeguards for *Had* crimes that many in the media fail to mention. Some in the media only mention that if you steal, your hand is cut off. The Islamic judge must look at a higher level of proof and reasons why the person committed the crime. A judge can only impose the *Had* punishment when a person confesses to the crime or there are enough witnesses to the crime. The usual number of witnesses is two, but in the case of adultery, four witnesses are required. The media often leaves the public with the impression that all are punished with flimsy evidence or limited proof. Islamic law has a very high level of proof for the most serious crimes and punishments. When there is doubt about the guilt of a *Had* crime, the judge must treat the crime as a lesser *Ta'zir* crime (means crimes against society as it is understood in modern legal jurisprudence). If there is no confession to a crime or not enough witnesses to the crime, Islamic law requires the *Had* crime to be punished as a *Ta'zir* crime." *ibid.*

indicates that accessorial liability did not receive much attention from Islamic jurists; instead their attention has been focused on the liability of the principal offenders because it was generally assumed that only the principal and co-principals are liable for these strict *Hudoud* punishments. These crimes have a specific punishment and must be applied regardless of time or place, while the punishment for accessorial activity changes from time to time, place to place, and is not governed by strict sense of authority as of *Hudoud*.⁹⁹ Thus, as stated above, *Hudoud* crimes focus on the liability of the principal and this leaves accessorial liability free from such punishment which means at the same time, as Ouda suggests, that there is no contradiction or disharmony between the secular discussion of accessorial liability (as it is the case in the F.P.C.) and Islamic *Sharia*.

(B) The derivative theory

As in English law, accessorial liability under the F.P.C. requires the derivative theory to operate which means, unless indicated otherwise, that the principal offender needs to commit or attempt to commit an offence, before any discussion of the liability of any other secondary parties.¹⁰⁰ It has been pointed out that there is no general

⁹⁹ Ouda, A., *Altshrea Aljenai Alislami Muqrana bel Alqanon Alwadai, Alguza Alawal* (Arabic. *Islamic Sharia Criminal Law Compared with Secular Law, Part One*) (11th ed. 1992), Beirut: Dar Alrisala. pp. 358-377.

¹⁰⁰ There are some offences, similar to accessorial liability, under the F.P.C. which do not require the derivative theory. It must be noted that such offences are classified in terms of the liability of the principal offender. These offences are: Offences against the external & internal security of the State: articles (150, b, c), (152), (153), (158), (160), (166), (169), (171), (197). Offences against transport: article (296). Offences against the religion and religious practice: articles (312), (313). Instigating or assisting suicide: article (335). For example: Article (188) treats an accessory as a principal offender in knowingly assisting gangs. It indicates: "Life or temporary imprisonment shall be imposed upon any person who knowingly supplies or give the gang mentioned in previous article [article 187] weapons, tools, equipment, tools to assets them in reaching their aim, sends them aid, raise funds for

liability in respect of the inchoate offences of incitement and conspiracy, which means that the derivative theory plays a major role under the F.P.C. in comparison with the situation of English law. The question should be asked is there any criminal liability of assisting crimes under the F.P.C. or a domestic penal code? I have already stated that the F.P.C. does not adopt general liability in respect of the inchoate offences of conspiracy and incitement but exceptionally chooses such forms in relation to certain crimes only. Moreover, on the same policy basis, the F.P.C. penalises some forms of assistance without any need of the derivative theory. An example of this is in article (335) which punishes anyone who either instigates or helps another to commit suicide. Apart from this article there might be no other express discussion of assisting crimes (*Cf.* see footnote 100 and article 225 of F.P.C.). This seems to be the same in relation to other domestic codes except the domestic Penal Code of Abu Dhabi in articles (15, 64) which make it a crime to assist another to commit murder or manslaughter (One might observe that this Code is broadly written and extremely vague and needs to be abandoned in favour of a more clear new code.)

One might inquire whether the F.P.C. could be interpreted to include a general inchoate liability under such terms but with a different heading that might incriminate some serious act of assistance to crime without any need for derivative theory. Let us consider the crime of exposure to danger provided for in article (348). This article states:

them, or involves in any kind of criminal communication with the leaders or directors of the gang, or by knowing their aim and character provides them with houses or places of meetings.” Article (150):

“A punishment of detention and fine or one of these shall be imposed on any person who intentionally commits an act which exposes the life, health, security, or freedom of people to danger. If a harm is resulted from the action, the punishment shall be a detention without any prejudice to any other severer punishment indicated by the law.”

One might suggest that the above article might deal with situations where one intentionally assists others to commit crimes which means that it can stand and relied upon if the trial of an accessory fails by some reasons to establish the derivative theory of complicity, or even before the principal's offence is committed. However, some points need to be addressed:

The above article was drafted under ‘offences against the person’, which denotes that it is only applied to this type of liability. The question is: can such an article include both instigation and assistance (despite the fact that the F.P.C. does not include a general inchoate offence of instigation and conspiracy except in relation to certain offences). No clear answer is available. However, the above article clearly shows that it is based on the theory of danger rather than of harm and that punishment is to be more severe if harm follows. This means that the aim of this article is to embrace both danger and harm. Inchoate offences are based on danger rationale, and it is appropriate that one should ask what would prevent the application of this article to actions of instigation, conspiracy, and assistance to a crime against the person, which is not eventually committed. There are two possible objections:

facilitation: “A death penalty shall be imposed on: ...B) any one who, at the time of war, instigate soldiers to join the service of any foreign state or facilitate such an action.”

First: Arabic jurisprudence does not approve of such a solution. I have already established that one country is different from another and that if legal authorities in the UAE take a contrary view they would be entitled to make their choice. Second: the F.P.C. does not deal with inchoate offences under a norm of general liability but only in relation to certain offences. This might be the main objection, however, because, under the broad application and function of article (348), mentioned above, one cannot exclude a behaviour that is dangerous in itself, such as selling or providing guns or other dangerous materials to others. However, one might enquire about the reason why article (348) was included in the F.P.C. No clear answer follows. However, because there is no explanation for the drafting of the above article and because of its broad application, the prosecution can charge, at least in a case of assisting a crime against the person, those who manifest dangerous attitudes that might cause harm to others. One should wait and see how UAE courts will react in either accepting or rejecting its application as a substitute to inchoate crimes. It must be noted that what has been said should not be taken as full support for the idea of penalising assistance as a way dealing with inchoate offence. One can agree that the F.P.C. needs to provide general liability for encouragement and conspiracy; this is, at least, an attempt to avoid applying those vague and outdated domestic codes which are causing disharmony in the general shape of criminal law especially regarding conspiracy (under the domestic Penal Code of Dubai 1970 conspiracy is a crime either to commit an offence or to breach civil law obligation. The latter is, in fact, inappropriate and needs to be omitted). Thus, encouragement and conspiracy should be included in any amendment of the F.P.C. This leaves us with assistance, which is not part of inchoate liability. If the legal authorities in the UAE feel the need

to punish the assisting of crimes, liability under article (348) *might be* a substitute for any culpability not included in the F.P.C. or, in certain crimes such as murder, robbery, or any grave offence, such liability might be required by the law. Otherwise, the structure of the F.P.C. would still need to depend on the derivative theory.

The problem of identifying accomplices:

It has been pointed out that accessorial liability is derivative in nature, so that if the principal offender did not commit the crime, then no accessorial liability should follow. However, one needs to ask whether the discussion of English law is relevant when the identity of the principal is not known. The F.P.C. does not directly answer this and the legal commentary is similar. I think that a distinction should be made between the *Sharia* crimes of *Hudoud*, and those crimes expressly mentioned by the F.P.C. In the case of the former, it seems that the courts must require the prosecution to distinguish between accomplices on the basis of whether they are principals or accessories because the fixed punishments of such crimes are only applied on the principal offenders. In the case of the latter, apart from the punishments of *Hudoud* crimes, article (47) enables a court to punish an accessory with a similar punishment to that of the principal. I believe that the flexible approach or method adopted by English law in this area should be followed by the UAE courts regarding those crimes mentioned by the F.P.C., especially where the prosecution shows good reason why the identity of the principal cannot be established. Moreover, I think that such an approach should be available to the prosecution regarding accessorial liability, which currently requires, in the charge list, the identification of which form of such liability the defendant committed. The prosecution only has to prove that each

accomplice instigated, conspired or assisted the commission of the crime. It must be noted that in the light of the principle of fair labelling, the prosecution, when it is possible, should distinguish accomplices according to their roles when they are charged with an offence. However, there should be an exception to this rule when the prosecution shows that such a distinction, depending on the facts of each case, is very difficult and that the defendants are actually accomplices to a crime that was committed. To avoid any conflict that might arise, it would be better for the F.P.C. to be amended to include a provision to cover such situations, even if the courts can currently use such a flexible method.

(C) Innocent Agency

As in English law, but unlike the Egyptian Penal Code (which does not include this type of liability), the F.P.C. applies the doctrine of innocent agency under the discussion of the liability of the principal offender. Article (44) indicates that a principal offender amongst others is, one who:

“... utilises another by any means to commit the actus reus of the crime, and that the latter person is not criminally responsible for any reason.”

Again, our discussion of the English law is relevant here. However, some points need further discussion. As in English law, one can not offer a clear definition of this doctrine in relation to its scope because the above article was set out in a general terms and the UAE courts have not addressed such an issue.

One might interpret the ambit of the above article to cover situations where a person instigates or assists another who lacks the required mens rea to commit an offence by reasons of being under seven years of age, insane, or where the act is done with good

faith. This means that the ambit of this doctrine is restricted to situations where the innocent agent lacks the required mens rea, as it set out in English case law. Consequently, one might conclude that this doctrine is not extended to cover situations when the actual principal has to have a particular characteristic, such as being a man in a rape or an official person in bribery charge; thus such a person is to be labelled as an accessory rather than a principal offender. However, the F.P.C. does not expressly suggest this, but another article in the Code might do so. Article (48) states that:

“If an accomplice is not punished for an offence by reason that his action is excused, for lack of intention or any other reason related to him, the other accomplices shall not benefit from such exemption.”

One might suggest that the drafting of this article might cover such situations where it is inappropriate to address the accused as principal (as the case of a woman in a rape charge). Moreover one might conclude here that the F.P.C. in article (44) is similar either to the English Draft Criminal Code which connects such doctrine to reasons of incapacity, lack of mens rea or where the principal has a defence, or according to article (48) as to English case law which appears to restrict the ambit of this doctrine to reasons of lack of mens rea, treating other examples as accessories. The UAE courts should perhaps clarify which approach is to be taken.

(D) Defences available to accessories

This is a rather uncertain area and neither the F.P.C., the cases, nor legal commentary offer any help in this regard. However, I shall examine the situation in the light of the discussion of English law.

General defences:

Nothing in the F.P.C. distinguishes between accessories and principals in relation to the general defences.¹⁰¹ Again, as the drafters of the English criminal Code have suggested, although it is not totally clear, that an accessory can claim on one or more of the general defences, if he thinks that such a defence fits his case.¹⁰²

Causation:

Causation does not appear in Arabic legal commentary as a defence to accessorial liability. However, UAE law is rather different from other Arabic criminal systems in this respect. One might note that in the discussion in chapter 2 (causation & omission) it was not clear how does the F.P.C. treats causation as an element of

¹⁰¹ The defences mentioned by the F.P.C. are: mistake, error of fact (article 39); performance of a duty by the law and superior order (articles 54-55); self defence of self, property and others (article 56); unwilful actions: involuntary intoxication, insanity (articles 60-1); infancy: a child under seven years of age is incapable of committing crime (article 62); juvenility 'defendants between seven to eighteen years of age are governed by Federal Juvenile Code No. 9 1976' (article 63); duress & necessity (article 64); motive is not a defence unless the law indicates otherwise (article 40); ignorance of law is not a defence (article 42); The F.P.C., in relation to criminal complicity, indicates in article (52) that: "If the classification of a crime or penalty changes in relation to the intent of an offender or as a result of his knowledge, accomplice whether principal or accessory to the crime shall be punished in accordance with his intent or knowledge." It must be noted that almost all these general defences are covered with uncertainty which makes it more difficult to examine it in relation to accessories. For example, it might be true to say that Islamic *Sharia* does not allow coercion or duress to be a defence in murder to principal and accessory. It is not clear how UAE courts would address this issue.

¹⁰² I think that defences provided by the domestic penal codes should be available to accessories. However, I notice that courts, especially Dubai's courts, seem to ignore such defences because, as it appears, these domestic penal codes were drafted in accordance to Anglo-Indian jurisprudence, which are not totally understood by many foreign judges. For example, according to article (16) of Dubai Penal Code the defence of provocation might be used to reduce punishment. *Cf.* the Dubai Cassation Court has ruled that provocation is not a defence to murder (contrary to the above article of Dubai Domestic Penal Code of 1970) www.albayan.co.ae/albayan/2000/04/06/mhl/10.htm [Arabic]. Moreover, according to article (20) of Dubai Penal Code, consent of the victim might constitute a defence in, probably, all offences covered by the Code, except in homicide, grievous bodily harm, where duress or mistake exists, when a victim was intoxicated or could not fully understand the nature of the action of the defendant, or when the victim was under fourteen years of age. The F.P.C. is silent in this regard, which might implicitly suggests that the above article, in the jurisdiction of Dubai only, a defendant has the chance to avoid punishment in terms of justification. Apparently, such exemption, has not yet been brought to the attention of Dubai's courts. The situation is not clear whether Dubai' courts will apply article (20) or try to find a justification not to apply it by reference to the Egyptian and other Arabic criminal laws, which do not recognise consent as part of their general defences.

accessorial liability. The reason for this is that the F.P.C., unlike other Arabic criminal codes, uses the term *accessory by causation* as a label attached to accessorial liability, which indicates that a casual link is required between the accessory's actus reus and the crime committed. I have already suggested that causation should not be regarded as an element of accessorial liability, and any future amendment of the F.P.C. should take this into consideration. However, as far as the current situation is concerned, the problem is whether such a requirement requires the accessory's action to be responsible for bringing about the perpetrator's offence, or to be only influential in bringing it about. It has been pointed out that Arabic legal commentary prefers a modified sort of causation applied only to accessories. This requires some sort of causal link based on the notion of *making the difference rather than being but-for causation*.¹⁰³ There is no reliable discussion to explain how this works, although it is possible that it might have been taken from an unknown legal system and applied in Egyptian law.¹⁰⁴ It seems that that the F.P.C. is rather different in this regard, in which requires causation to be based on the notion of *sine qua non*, which seems to be the required test under the general provision of causation in article (32).¹⁰⁵ A defendant might claim this defence if he believes that his action falls short

¹⁰³ This test is based on an answer to the following: did the accessory's action matter? Did it make any difference? If so, then there is causal link even if it does not amount to cause a *sine qua non*, and this differs from case to case. See: Chapter 2: UAE law.

¹⁰⁴ Even major source books in this regard provides little assistance. For example M. Husni in his book *Causation in Penal Code*, which is a source book in causation in general, does not explain in definite terms how one can apply this sort of causation in deciding accessorial liability. Husni, M., *Ilakat Alsababia fee Qanon Alokobat*, (Arabic. *Causation in Penal Code*) (1983), Egypt: Dar Alnhda Alarabia. A similar conclusion is reached by reading Rauof Obaid's book on causation, which is the second major book on the subject. Obaid, R., *Alsababia Aljenaia bean Alfekh wal Alqda*, (Arabic. *Criminal Causation in Legal Commentaries and Courts*) (4th ed. 1984) Cairo.

¹⁰⁵ Article (32) of the F.P.C. indicates that: "A person shall not responsible for a crime if it is not a result of his own criminal activity: however, he may be responsible for a crime even if his criminal activity and another preceding, contemporary or subsequent cause have contributed to it occurrence, where such a cause is expected or likely to happen in the ordinary course of things. However, if such

of what is required by article (32) to avoid accessorial liability. This is the only way which might oblige UAE courts to take responsibility for explaining the law (the judgements are limited and do not help our understanding of how legal concepts work). It is difficult to anticipate the reaction of the courts in this regard, but the fact that what has been suggested by legal commentary is irrelevant. Thus, causation involves either strictly applying the general theory causation indicated in article (32), or finding an answer in such an article. Any thing beyond this would be an infringement of the principle of legality.

Intention:

It has already been pointed that the area of mens rea is problematic, and that legal commentators are divided on this point. I have mentioned that foreign judges properly prefer applying a system they know rather than searching the direct words of the F.P.C. In order to avoid such problems I suggest the position set out in chapter 3 (the required mens rea of accessorial liability) should be taken to represent the current situation of the F.P.C. which means that the only required mens rea is intention. It should be the required mens rea, regardless of the mens rea of the principal offender.

cause is sufficient to produce the result of the crime, the person shall in this case be responsible only for the act he has committed.”

Withdrawal:

According to article (40) motive is irrelevant unless the law indicates otherwise. An examination of the F.P.C. reveals that it adopts notion of withdrawal in some offences. For example, article (173) (exemption from the penalties of crimes affecting the external security of the State) states that:

“An exemption from the penalties indicated in this chapter is granted to any offender who informs the judicial or administrative authorities with any information he knows before the attempt to commit the crime and prior to the investigation.

The court may grant such exemption if the information occurs after the committing of the crime but before starting its investigation. The court may reduce the penalty if the offender provide a helpful assistance to the concerned authorities during the investigation, trial which facilitate arresting any other offenders of the crime.”¹⁰⁶

By comparison, the F.P.C. does not expressly indicate that this is a defence available to accessorial liability. Should one conclude that it should not be? The answer must be in the negative because although the above article might implicitly suggest otherwise, withdrawal is a defence and should be available to accessories before the principal commits the offence. By the same token it should mitigate the sentence if it occurs after the principal attempts in committing the offence. It is not clear how this defence would work, but because of the causal requirement under which the F.P.C. requires in accessorial liability the following might represent the law on this point.

¹⁰⁶ Other similar articles are mentioned in the F.P.C.: Attempt: article (34). Offence against the external security of the State: article (197). Offence against the internal security of the State: article (201). Offence against the financial interest of the State: article (210). Bribery: article (239). Offence against the religion and religious practice: article (326).

Obviously there must be a timely communication of the intention of withdrawal to the principal or the principals and those features which both Ashworth and Gilles previously suggested. The possible justification for withdrawal as a defence under the F.P.C. is the lack of actus reus, without any need that the F.P.C. should expressly indicate this (although it is required when the law is vague as it is nearly always the case of the F.P.C.). I believe that the discussion of this subject of English law is relevant under the UAE law with the exception that the causal requirement suggests that more is required from accessories to avoid punishment. Second, I think that the UAE courts have a responsibility in explaining how such a defence might work and if there is any need to distinguish it from one form to another.

(E) Other related issues:

Victims:

There is a broad agreement that unwilling victims are not parties to crimes committed upon them. Thus, the discussion should focus on willing victims in order to ascertain whether they should be considered as parties to the crime. There is no clear authority on this point, either in the F.P.C. or in cases; moreover, this subject is not discussed by Arabic legal commentary. It is possible to say that the consent of the victims would either constitute a justification for an act (e.g. theft) or that it changes the classification of an offence (e.g. rape to adultery or fornication). However, one should ask whether there is there a slight possibility that English law discussion of the subject is relevant regarding crimes such as some sexual offences. Article (354) of the F.P.C., under the heading 'rape and indecent acts' states that:

“...Whoever resorts to coercion in unlawful sexual intercourse with a female or a male shall be punished by the death penalty. A case of coercion shall arise if the victim at the time of the crime was under fourteen years of age.”

Here, the F.P.C. has expressly excluded the victim under fourteen from any penalty and no weight has been given to the victim's consent. At the same time, the situation remains vague. It must be noted that there is no counterpart in the F.P.C. to the discussion of victims as in English law, which might suggest that that all victims, whether willing or unwilling, are exempt from accessorial liability.¹⁰⁷

¹⁰⁷ In the English case *Socket* (1908) 1 Cr. App. Rep. 101, it was held that a woman can be convicted as an accomplice to unlawful abortion on herself. I shall discuss below whether the F.P.C. takes a similar position. For example, article (340) of the F.P.C. indicates that: “Whoever wilfully aborts a pregnant woman by giving her drugs or by applying any other means which leads to abortion, shall be punished by imprisonment for a period not exceeding five years. Punishment by imprisonment for a period not exceeding seven years shall be inflicted if the crime is committed without her consent.” As it appears, abortion is not a criminal offence if committed by a pregnant woman on herself, only the person who aborts her is penalised. However, is there a possibility that accessorial liability plays some part here. The answer should be in negative because of the following: The important question is that who is protected by the above article: the foetus or the mother? In the former, one can possibly conclude that the mother is an accessory to abortion while if she is the protected one, then, no accessorial liability would follow. It is not clear what the drafters of the F.P.C. had in mind, but it possible to say that the willing mother is not a victim if she commits the crime against the foetus's right to be delivered and she should be treated as an accessory. Having said that there is one major dilemma here, which is related to the activity of the pregnant mother in the offence whether she was a principal or accessory by means of assistance, encouragement, or conspiracy. In fact because of the nature of abortion, the pregnant woman is to be considered as a principal to that crime and this logically suggests that the legislator, according to the rule of legality, have to expressly provide a special provision or article for convicting the mother as a principal offender. Thus, the subject of victims' defence or parties to crime has no ground under the UAE criminal law.

Conclusion

Conclusion

English Law

The discussion of secondary partnership in crime has been the subject of considerable debate and is still controversial in both case law and legal commentary. This is a clear sign that shows the amount of uncertainty and vagueness that surrounds nearly every aspect of this subject, which has been labelled as the worst feature of English criminal law because its relative incoherence. A side effect of such uncertainty of the subject is that it is almost entirely governed by precedents which fail to deal fully with many of the problematic issues. It is because of this case law approach that there has been no overall analysis of the issue, something which might have been expected to be achieved in full-scale legislative reform. For this reason one might conclude that codification of this type of liability is both necessary and urgent in order to meet the objectives of accessibility, comprehensibility, consistency, and certainty that criminal law requires.

Any future codification of English law might take into account the following consideration:

- 1) The four words that describe the actus reus of accessorial liability 'aid, abet, counsel, procure' should be reduced to three: encouragement, assistance and procurement. (See: chapter 1, pp. 20-32).

2) There are good grounds, in English law for not allowing causation, as it is required for the liability of the principal, to be an element in accessorial liability, apart from procurement. However, this asserts that the required mens rea should be higher than is currently the case. (See: chapter 2, pp. 56-69).

3) Accessorial liability in omission is wide and excessive. The legislature (or case law) should either expressly elaborate in which crimes accessorial liability is established by omission. Or, as has been suggested by LC. No. 131, the required mens rea should be based on criminal intention and knowledge should be considered only as *prima-facie* evidence from which the jury could infer intention of accessorial liability in omission. (See: chapter 2, pp. 76-88).

4) English law should expressly acknowledge that, currently, apart from in the case of procurement, case law has shifted the mens rea required for accessorial liability from specific intention to a basic intention, which means that the mens rea can be located either in intention or subjective recklessness. In this regard, it is inappropriate to use of what is called a dual mens rea requirement (intention to aid, abet, counsel and knowledge that principal might commit the offence) because it is vague and does not have any clear connection with the general requirement of mens rea under English law. (See: chapter 3, pp. 103-146).

5) The current level of mens rea required is very low, uncontrolled, and brings normal activities into the net of incrimination, a situation intended by the policy makers to give English criminal law wider power to control many secondary

activities which support the commission of crime. English law has shifted the required mens rea to recklessness in order to fight crime but has not addressed the position of the principal offender; it is even possible that recklessness might at some future stage be inferred from mere suspicion. Because of the actual and theoretical differences between a principal and an accessory, and in order to establish a balance between applying both intention and knowledge, the required mens rea should be based on intention according to the English Draft Code in cl. 18 (b) (ii) (purpose and knowledge that the crime is virtually certain to follow). This can encompass willingness and indifference. Any other form, if sufficient, should be a crime on its own outside the net of accessorial liability. Exceptionally, purpose should be required for encouragement and procurement, while knowledge should be enough for assistance. However, in this case, there should be an investigation of new possible defences to limit the broadness of the mens rea in this regard. (See: chapter 3, pp. 109-146).

6) Because of the wider and floating mens rea of accessorial liability, knowledge of the future crime of the principal is problematic and raises many doubts, confusing the term knowledge with other related concepts such as suspicion that the principal will commit the actus reus. English law shifted this concept of knowledge of the future crime of the principal from unspecified discussion of knowledge of essential matters, (*Johnson v. Youden*) which required full knowledge, to an objective standard that required knowledge of the principal's intention to commit a crime of the type which was committed (*Bainbridge*). It then returned to a subjective standard that stresses that it is enough that accessories contemplate the range of offences that might be

likely to be committed by the principal (*Maxwell*). If the required mens rea is not connected to a “higher” state of mind, proposition no. 10 of English Law Commission No. 43 should be taken into consideration to solve the problem of possibly endless convictions that could result from applying knowledge broadly.¹ (See: chapter 3, pp. 131-146).

7) Although English law has turned recently to focus on contemplation (subjective recklessness) as the required mens rea for accessorial liability for the additional offences (doctrine of common purpose), there is room to allow tacit/express agreement to play a role in deciding the required mens rea with contemplation. It has been pointed out that there are some problems in adopting the both tests together. English law should expressly state which is to be taken and if both applied it should state how it could possibly work. Because of the low mens rea in this regard, English law should take into consideration whether or not to require a higher state of mind for both the main and the additional offence. Alternatively, it could require intention (purpose and oblique) for the main offence and keep using subjective recklessness for the additional offence. (See: chapter 4, pp. 205-243).

8) Derivative theory should not be abandoned for a risk-based theory as suggested by English Law Commission No. 131. The Law Commission might instead then discuss whether there is a need to create an inchoate offence of assisting crimes, an offence with its own punishment. It might also take into consideration the ambit of such a

¹ “Where a principal is helped in the commission of more than one offence by a single act of help, the accessory who afforded that help shall not, after having been convicted of one or more of such offences, be convicted of another of such offences of equal or lesser gravity.”

new offence and the required mens rea in comparison with other inchoate offences. (See: chapter 5, pp. 284-295).

9) English law should clarify the ambit of the doctrine of innocent agency. (See: chapter 5, pp. 295-299).

10) The defence of withdrawal is vague especially in relation to the time factor in which withdrawal can be established. Any future codification, or even case law development, should use simple terms to describe such a defence and clarify what amounts to a sufficient withdrawal. (See: chapter 5, pp. 302-309).

11) English law should seriously consider employing cl. 27. (6) of the English Draft Criminal Code 1989, and to provide other possible defences to the current low mens rea. (See: chapter 5, pp. 311-314).

UAE Law

This study shows that the subject of accessorial liability is ambiguous, defective, and ill-structured. It reveals an example of many vague areas of the F.P.C. Many mistakenly believe that such law is to be interpreted and examined exclusively by reference to a particular jurisprudence, however, as has been argued above, there is clear evidence that this is a misleading and inaccurate idea. In fact UAE criminal law is a combination of Islamic *Sharia*, French–Egyptian, Anglo-Indian sets of jurisprudential inference, and is quite capable of employing other legal concepts from different legal systems. Neither legislation, courts, nor legal education take this

into consideration, which causes a lack of cohesion to the overall shape of the UAE criminal system putting it under a form of house arrest and inhibiting legal development and reform.

The following is recommended:

1) To avoid, or at least to limit the uncertainty that currently surrounds almost every aspect of the F.P.C. and other related codes, there must be a draft memorandum to explain the codes. The UAE courts should take a responsibility in explaining the law. (See: introduction, pp. 2-12).

2) The legislation or courts should clarify the meaning of instigation. As it appears it is currently defined to only include the liability of the prime instigator or the one who puts the idea for a crime into the mind of the principal offender. The definition should encompass the state of collective instigation or supportive instigation of the principal offender and not only “initiative instigation.” (See: chapter 1, pp. 37-42).

3) It is arguable that the F.P.C. requires causation to be an essential part of the required actus reus of accessorial liability. Causation must be investigated then, or charges of accessorial involvement may collapse. Unfortunately, neither Arabic commentary nor domestic judicial opinion offers any answer as to how causation should operate. Thus the concept of causation should be governed by article (32) and similarly should be applied to both the principal offender and the accessory. Otherwise, the rule of legality and even the principle of common sense, suggest that an accessory is entitled to have a defence of causation. Although it is evident that

causation should not be regarded as element of accessorial liability, any future amendment of the F.P.C. should seriously take this into consideration. Currently, UAE courts have a major responsibility in interpreting article (32), which is actually vague, to decide how both of the principle and the accessory are subject to it. (See: chapter 2, pp. 70-75; chapter 5, pp. 327-329).

4) Although that the F.P.C. is vague as to whether omission can constitute an *actus reus* of accessorial liability, this should not be taken as conclusive evidence to exclude omission where there is a duty to act. To avoid such uncertainty, the F.P.C. should expressly state that omission is sufficient to be regarded as an aspect of the required *actus reus* for accessorial liability. (See: chapter 2, pp. 89-100).

5) Under the F.P.C., there is doubt as to what accessorial *mens rea* requires, whether intention, fault or both. Furthermore, the requirement of the coincidence of *mens rea* between accomplices is neither expressly nor implicitly stated. This means that under the F.P.C. the required *mens rea* of accessorial liability is intention, otherwise an accessory is entitled to have a defence. Moreover, further investigation might suggest that intention should be required, regardless of the *mens rea* of the principal offender. In order to have a norm of flexibility, the legal authorities in the UAE, when amending the F.P.C., should take into consideration that in order to capture many activities which probably now are outside the net of accessorial liability, knowledge of virtual certainty should be adopted within the required *mens rea* by adopting either the approaches of M.P.C. or the English Draft Code which both treats knowledge of virtual certainty as close to intention. This requirement would be considered in the

light of the fact of each case. If this approach is not taken, the required mens rea should be based on intention, and fault should be adopted where the principal acts with a similar state of mind only in relation to some serious fault crimes. (See: chapter 3, pp. 162-204).

6) UAE courts should understand that the essence of accessorial liability under the F.P.C. is not the depiction of joint intention as dealt with by the Arabic commentators, but rather it lies in the accessory's willingness to contribute to the offence of the principal offender, based on his intention to participate. The essence of the subject can be extended to include both willingness and a high degree of knowledge of a crime if oblique intention is accepted to be within the range of accessorial mens rea. . (See: chapter 3, pp. 186-204).

7) Under article (51), in respect of liability for an additional offence, the liability of accessories is judged by an exceptional form of responsibility, which links their guilt to crimes outside the scope of their agreement by means of a vague theory called the probable consequence test. Intensive interpretation of the above article indicates that the issue of mens rea is not even related to the notion of a reasonable man, which by the same token, suggests that there is no mens rea required for such liability. The amendment of the F.P.C. should abandon the use of the vague probable test and expressly state that the required mens rea is intention (purpose or oblique), fault (subjective recklessness, or objective recklessness), both of which insist on evaluating the whole facts of the case before conviction. Until such an amendment UAE courts should require fault (objective recklessness) based on the notion of a

reasonable man as the only means to preventing the harsh application of the imputed liability of article (51). (See: chapter 4, pp. 247-274).

8) To take into consideration that there is a need to have a general inchoate liability for instigation and conspiracy and also to consider having an inchoate liability for assisting crimes. (See: chapter 5, pp. 320-325).

9) The F.P.C. should be amended to include a provision to indicate that when it is very difficult to distinguish the principal from the accessory, all should be tried for the same crime provided that they are accomplices to each other. However, a distinction should be made between Islamic *Sharia* crimes and those crimes expressly mentioned by the F.P.C. For the first, it seems that the courts must require prosecution to distinguish between accomplices into principals and accessories because the fixed punishments of such crimes are only applied to the principal offenders, otherwise all accomplices should be subject to lesser punishments. For the second, for indictment on a crime mentioned by the F.P.C. article (47) enables a court to penalise an accessory with similar punishment to that imposed upon the principal. (See: introduction, pp. 7-8; chapter 5, pp. 319-320, pp. 324-325).

10) Legislation and courts should distinguish between a principal and an accessory in response to their different type of liability and to their different roles in a crime. (See: chapter 5, pp. 278-284, pp. 316-320 and article 47 of the F.P.C.).

11) Both lack of causation and lack of intention should be a defence if the courts continue to give weight to the view of Arabic jurisprudence which has been set out above. (See: chapter 5, pp. 327-329).

12) Although withdrawal is possibly a defence under the current situation, the F.P.C. should expressly state this to avoid any vagueness. Also, the F.P.C. should clarify the circumstances in which such a defence is a full defence or merely a mitigation of punishment, and to explain the time factor within which withdrawal can be effective. (See: chapter 5, pp. 330-331).

13) The F.P.C. should include the defences of the English Draft Criminal Code 1989, in cl. 27. (6), and discuss other possible defences, if knowledge of virtual certainty is accepted to be the minimum required mens rea. (See: chapter 5, pp. 311-314).

Appendix

Selected articles from the F.P.C., which have been used in the thesis.¹

Article (1) of the *Presidential Order* to issue the F.P.C.:

“The law attached here on crimes and penalties shall be enforced, and any provision contrary to its provision shall be repealed.”

Article (1):

“Islamic *Sharia* shall apply to the crimes of *Hudoud*, *Qisas*, and *Diyah*. *Tazia'ar* crimes and its punishments shall be determined in accordance with the provisions of this Code and other penal codes.”

Article (19):

“This Code applies to any one who commits an act outside the UAE, which makes him a principal or accessory to a crime committed entirely or partly in the UAE.”

Article (26):

“Crimes are divided into the following:

- (1) *Hudoud*,
- (2) *Qisas* and *Diyah* crimes,
- (3) *Tazia'ar* crimes are of three types: felonies, misdemeanours, and contraventions. This classification is determined in accordance with the punishment mentioned by the Code...”

Article (28):

“A felony is a crime punishable by any of the following:

- (1) any punishment of *Hudoud* crimes, and *Qisas* crimes except of *Shurb al-Khamr* (drinking alcohol) and *al-Qadhf* (false accusation of illicit sexual intercourse),
- (2) death penalty,
- (3) life imprisonment,
- (4) temporary imprisonment (imprisonment of not less than three years and not exceeding fifteen years).”

Article (29):

“A misdemeanour is a crime punishable by one or more of the following:

- (1) detention (of not less than one month and not exceeding three years),
- (2) a fine exceeding 1000 Dirhams,
- (3) *Diyah*,

¹ UAE Federal Law No. 3 of 1987 on Penal Code (in Arabic), published in the UAE Official Gazette No. 182, 20/12/1987, pp. 7-226; Abdo, D., *UAE Law No. 3 of 1987 on Penal Code*, (Unofficial Translation), (1995), Jordan: Amin Abdo Publication. I have translated the above articles from the above two sources; some amendments however, were necessarily required.

(4) lashes (whipping) for *Shurb al-Khamr* (drinking alcohol) and *al-Qadhf* (accusation of illicit sexual intercourse).”

Article (30):

“A contravention is any act or omission punishable by the codes or regulations by one or both of the following:

- (1) custody for a period not less than 24 hours and not exceeding 10 days in any of the places designated for that purpose,
- (2) a fine not exceeding 1000 Dirhams.”

Article (32):

“A person shall not be responsible for a crime if it is not a result of his own criminal activity: however, he may be responsible for a crime even if his criminal activity and another preceding, contemporary or subsequent cause have contributed to its occurrence, where such a cause is expected or likely to happen in the ordinary course of things. However, if such cause is sufficient to produce the result of the crime, the person shall in this case be responsible only for the act he has committed.”

Article (38):

“The *mens rea* of a crime consists of intention or fault. Intention arises when the accused’s will moves towards the commission or omission of an act, where such commission or omission is legally defined as a crime, for the purpose of producing a direct effect or any other criminal result which the offender has expected.

Fault arises if a criminal result occurs by reasons of the defendant’s fault, whether such a fault is negligence, indifference, carelessness, recklessness, imprudence or non-compliance with laws, regulations rules or orders.”

Article (41):

“A defendant who is ignorant of the aggravating circumstances that change the classification of a crime, shall not be responsible accordingly; however, he may benefit from the mitigating factor although he is ignorant thereof.”

Article (43):

“An offender shall be responsible for a crime whether he has committed it with intention or fault, unless the law explicitly provides for intention.”

Article (44):

“A principal of a crime is the one who either commits it by himself or is a direct accomplice in its commission. A person shall be a direct accomplice to a crime in the following instances:

First: where he joins another in the committing of an offence.

Second: where he takes part in the committing of an offence that consists of several acts, and he intentionally commits any such act.

Third: where he utilises another person by any means to commit an offence, and that the latter is not responsible, for any reason, under criminal law.”

Article (45):

“A person shall be considered as an accessory to a crime by causation:

First: if he instigates a crime, and it occurs in accordance with such instigation.

Second: if he conspires with others to commit a crime, and it occurs in accordance with such conspiracy.

Third: if he gives the perpetrator a weapon, tools or any other item which he knows will be used in committing the crime, or if he wilfully aids the perpetrator by any other means or actions which can pave the way for the committing or completion of a crime.”

Article (46):

“An accessory by causation shall be considered as a direct accomplice (a principal), provided that he is found at the scene of an offence with intention to commit it if it is not committed by another person.”

Article (47):

“Any person who participates in an offence, whether a principal or accessory, shall receive the same penalty unless the law provides otherwise.”

Article (48):

“If an accomplice is not punished for an offence by reason that his action is excused, for lack of intention or any other reason related to him, the other accomplices shall not benefit from such exemption.”

Article (51):

“An accomplice (co-principal and accessory by causation) to an offence shall receive the penalty of the offence which has been committed, notwithstanding that it is different from that intended to be committed, whenever the offence which took place is a probable result of the participation.”

Article (52):

“If the classification of a crime or penalty changes in relation to the intent of an offender or as a result of his knowledge, an accomplice whether principal or accessory to the crime shall be punished in accordance with his intent or knowledge.”

Article (102):

“Without prejudice to the cases in which the law states special causes for severity, the following shall, *inter alia*, be considered to be aggravating circumstances:

- (1) commitment of a crime for a vicious motive,
- (2) commitment of a crime, by exploiting the victims mental element weakness or his inability to resist, or circumstances where are unable to defend himself,
- (3) commitment of a crime in a savage way or by mutilating a victim,
- (4) commitment of a crime by a public official, by taking advantage of his official authorities or his capacity, unless the law provides a certain punishment, owing to such a capacity.”

Article (103):

“Where there is an aggravating circumstance, the court may impose penalty as follows:

- (1) if the principal penalty for a crime is a fine, its maximum limit may be doubled or a judgement of detention may be awarded,
- (2) if the principal penalty for a crime is detention, its maximum may be doubled,
- (3) if the principal penalty is imprisonment with a maximum period of less than fifteen years, the penalty may be imposed to such an extent,
- (4) if the principal penalty for a crime is temporary imprisonment with a maximum period, it may be commuted to life imprisonment.”

Article (150):

“A death penalty shall be imposed on...

B) any one who, at the time of war, instigate soldiers to join the service of any foreign state or facilitate such an action.”

Article (171):

“A person is considered as an accessory by causation in crimes indicated in this chapter (Chapter One, crimes affecting the external security of the State, articles: 149- 173) if he:

- 1) is aware of the criminal offender’s intention and supplies him with aid, means of subsistence, accommodation, shelter, a meeting place or other facilities, carries his letters, facilitate his search for the subject of the crime, concealed; transport; or provide him with information,
- 2) is knowingly conceals things used, or to be used in the crimes, or resulted from it,
- 3) destroys, steals, conceals, or purposely change the facts of a document which helps to detect the crime, evidence, or punish the offender.”

Article (173):

“An exemption from the penalties indicated in this chapter (Chapter One, crimes affecting the external security of the State, articles: 149- 173) is granted to any offender who informs the judicial or administrative authorities with any information he knows before the attempt to commit the crime and prior to the investigation.

The court may grant such exemption if the information occurs after the committing of the crime but before starting its investigation. The court may reduce the penalty if the offender provide a helpful assistance to the concerned authorities during the investigation, trial which facilitate arresting any other offenders of the crime.”

Article (187):

“A death penalty or life imprisonment shall be imposed upon any person who commands an armed gang, takes the gang charge, or manages its movement; system for the purpose of capturing, plundering territories, or properties owned by the State or any group of people, or for the purpose of resisting the military force ordered to capture the offenders of these crimes. Other members of such a gang shall be punished by temporary imprisonment.”

Article (188):

“Life or temporary imprisonment shall be imposed upon any person who knowingly supplies or give the gang mentioned in previous article [article 187] weapons, tools, equipment, tools to help them in reaching their aim, sends them aid, raise funds for them, or involves in any kind of criminal communication with the leaders or

directors of the gang, or by knowing their aim and character provides them with houses or places of meetings.”

Article (242):

“A prison term shall be imposed upon any public office holder who uses torture, force or threat, by himself or by another, against a defendant, witness or an expert, causing him to confess to a crime or to make statement or give information in respect thereof, or to suppress any such matters.”

Article (272):

“Any public official or person in charge of detecting crimes and arresting the accused, who fails or defers to inform about a crime within his knowledge shall be punished by detention or fine.

A fine shall be imposed upon any official who is not in charge of detecting or seizing crimes, and who neglect or delays to inform the concerned authorities of a crimes within his knowledge, in the course of or in respect of his duty job.

There shall be no punishment in the above two paragraphs if the legal action of the crime requires a complaint.

Exemption from the penalty of the second paragraph may be granted if the official is a spouse of the defendant, one of his descendants, ascendants, brothers, sisters or having the same degree of relationship by marriage.”

Article (274):

“A fine not exceeding 1000 Dirhams shall be imposed on whoever becomes aware of a crime and abstains from informing the concerned authorities. Exemption from the penalty may be granted if such person is a spouse of the defendant, one of his descendants, ascendants, brothers, sisters or in laws having the same degree of relationship by marriage.”

Article (336):

“Whoever assaults another person physically in any manner without intending murder, but the assault leads to death, shall be sentenced to imprisonment for a period not exceeding ten years.”

Article (340):

“Whoever wilfully aborts a pregnant woman by giving her drugs or by applying any other means which leads to abortion, shall be punished by imprisonment for a period not exceeding five years. Punishment by imprisonment for a period not exceeding seven years shall be inflicted if the crime is committed without her consent.”

Article (348):

“A punishment of detention and fine or one of these shall be imposed on any person who intentionally commits an act which exposes the life, health, security, or freedom of people to danger. If a harm is resulted from the action, the punishment shall be a detention without any prejudice to any other severer punishment indicated by the law.”

Article (354):

“...Whoever resorts to coercion in unlawful sexual intercourse with a female or a male shall be punished by the death penalty. A case of coercion shall arise if the victim at the time of the crime was under fourteen years of age.”

Article (388):

“... Punishment by imprisonment for at least five years and at most seven years shall be inflicted for an act of theft if it is committed by a workman at his place of work or it causes damage to his employer.”

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